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INTERNATIONAL JUDICIAL CONFERENCE
ON CROSS-BORDER FAMILY RELOCATION, 23-25 MARCH 2010,
WASHINGTON, D.C., UNITED STATES OF AMERICA

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The Hague Conference on Private International Law wishes to express its sincere gratitude to the co-organiser of this Conference, the International Centre for Missing and Exploited Children. ICMEC has provided both expert practical assistance and essential financial support, without which this Conference could not have taken place. Furthermore, publication of this Special Edition of the Judges' Newsletter would not have been possible without the generous financial support of ICMEC.

The Hague Conference also wishes to thank the United States Department of State for their support of the Conference and, in particular, for hosting the Conference.



WASHINGTON DECLARATION ON INTERNATIONAL FAMILY RELOCATION

On 23-25 March 2010, more than 50 judges and other experts from Argentina, Australia, Brazil, Canada, France, Egypt, Germany, India, Mexico, New Zealand, Pakistan, Spain, United Kingdom and the United States of America, including experts from the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children, met in Washington, D.C. to discuss cross-border family relocation. They agreed on the following:

Availability of Legal Procedures Concerning International Relocation

1. States should ensure that legal procedures are available to apply to the competent authority for the right to relocate with the child. Parties should be strongly encouraged to use the legal procedures and not to act unilaterally.

Reasonable Notice of International Relocation

2. The person who intends to apply for international relocation with the child should, in the best interests of the child, provide reasonable notice of his or her intention before commencing proceedings or, where proceedings are unnecessary, before relocation occurs.

Factors Relevant to Decisions on International Relocation

3. In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation.
4. In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors listed in no order of priority. The weight to be given to any one factor will vary from case to case:
 - i) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest;
 - ii) the views of the child having regard to the child's age and maturity;
 - iii) the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;
 - iv) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;
 - v) any history of family violence or abuse, whether physical or psychological;
 - vi) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;
 - vii) pre-existing custody and access determinations;
 - viii) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;
 - ix) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;
 - x) whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;
 - xi) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;
 - xii) issues of mobility for family members; and
 - xiii) any other circumstances deemed to be relevant by the judge.
5. While these factors may have application to domestic relocation they are primarily directed to international relocation and thus generally involve considerations of international family law.
6. The factors reflect research findings concerning children's needs and development in the context of relocation.

The Hague Conventions of 1980 on International Child Abduction and 1996 on International Child Protection

7. It is recognised that the Hague Conventions of 1980 and 1996 provide a global framework for international co-operation in respect of cross-border family relocations. The 1980 Convention provides the principal remedy (the order for the return of the child) for unlawful relocations. The 1996 Convention allows for the establishment and (advance) recognition and enforcement of relocation orders and the conditions attached to them. It facilitates direct co-operation between administrative and judicial authorities between the two States concerned, as well as the exchange of information relevant to the child's protection. With due regard to the domestic laws of the

States, this framework should be seen as an integral part of the global system for the protection of children's rights. States that have not already done so are urged to join these Conventions.

Promoting Agreement

8. The voluntary settlement of relocation disputes between parents should be a major goal. Mediation and similar facilities to encourage agreement between the parents should be promoted and made available both outside and in the context of court proceedings. The views of the child should be considered, having regard to the child's age and maturity, within the various processes.

Enforcement of Relocation Orders

9. Orders for relocation and the conditions attached to them should be able to be enforced in the State of destination. Accordingly States of destination should consider making orders that reflect those made in the State of origin. Where such authority does not exist, States should consider the desirability of introducing appropriate enabling provisions in their domestic law to allow for the making of orders that reflect those made in the State of origin.

Modification of Contact Provisions

10. Authorities in the State of destination should not terminate or reduce the left behind parent's contact unless substantial changes affecting the best interests of the child have occurred.

Direct Judicial Communications

11. Direct judicial communications between judges in the affected jurisdictions are encouraged to help establish, recognise and enforce, replicate and modify, where necessary, relocation orders.

Research

12. It is recognised that additional research in the area of relocation is necessary to analyse trends and outcomes in relocation cases.

Further Development and Promotion of Principles

13. The Hague Conference on Private International Law, in co-operation with the International Centre for Missing and Exploited Children, is encouraged to pursue the further development of the principles set out in this Declaration and to consider the feasibility of embodying all or some of these principles in an international instrument. To this end, they are encouraged to promote international awareness of these principles, for example through judicial training and other capacity building programmes.

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1. AN INTRODUCTION: THE OPENING PLENARY SESSION

Ernie ALLEN

President & Chief Executive Officer, International Centre for Missing & Exploited Children and National Center for Missing & Exploited Children



In his "State of the Union" address in 1998, former U.S. President Bill Clinton said, *"Quietly, but with gathering force, the ground has shifted beneath our feet as we have moved into an Information Age, a global economy, a truly new world."*

He was right. Our world has changed in fundamental ways, some positive, some not. The world has shrunk. The concept of global neighborhood is not as far-fetched as it once seemed.

In many areas this era of easy global travel and communications has presented endless possibilities and opportunities. In the area of family law, it has also created some seemingly unsolvable challenges. Over the next three days, we will grapple with an increasing phenomenon in which a custodial parent seeks to relocate with his or her child to another city, another country, even to the other side of the world.

For judges, this presents a Solomon-like dilemma. If you approve it, you effectively deny reasonable access for the left-behind parent to his or her child. If you don't approve it, you effectively deny what might have been a life-changing opportunity for the other parent and the child. This is a human challenge of the highest order, but it is also a daunting legal challenge, one that may be handled very differently depending on what judge in what court in what country actually handles the case.

We at the International Centre for Missing & Exploited Children are pleased to have the opportunity to join with our friends at the Hague Conference on Private International Law and the U.S. State Department in hosting this important international judicial conference. We are honored and deeply grateful that so many judges, scholars and experts from around the world would take the time to participate in the discussions of the next three days. We look forward to your conclusions and recommendations, and to assisting in the effort to put them into practice around the world.

The International Centre is working tirelessly to address this and other challenges in law and policy. In partnership with Interpol and Microsoft, we have trained police in 114 countries in the investigation of computer-facilitated crimes against children. We are implementing new technology tools for law enforcement in many countries.

We have created a global missing children's network, now linking 17 countries. We are working with parliamentary leaders to enact new laws regarding child sexual exploitation and child pornography. We are helping to set up new centers addressing the problems of child abduction and sexual exploitation in many countries.

Through our new Koons Family Institute on International Law and Policy, we are attempting to create a kind of Brookings Institution for children, undertaking policy-related research and analysis in fields related to child abduction and exploitation. Our goal is to build greater knowledge, awareness and understanding for policy makers and the general public on a range of difficult issues relating to children. Today, the Koons Institute is a reality thanks to the kindness of world-renowned artist, Jeff Koons, himself a victim parent, whose child was abducted and taken internationally.

I am particularly proud of the long-standing partnership between the International Centre and the Hague Conference, with whom we are collaborating on this conference. We will work together to spread the word to the entire international community.

One year ago, some of you were with us in Cairo as the International Centre convened a forum, chaired by Her Excellency Mrs. Suzanne Mubarak, the First Lady of the Arab Republic of Egypt. The forum examined several pressing issues facing the world's children. Two of those who addressed that conference are with us today: Hague Conference Deputy Secretary General William Duncan and the Deputy Chief Justice of the Supreme Constitutional Court of Egypt, Adel Omar Sherif. At the close of the session, the attendees adopted what was called, "The Cairo Declaration." One of the key provisions reads as follows:

"Family disputes can have a devastating impact on children. Parents have the responsibility to shield their children from the negative effects of family discord. Children must not be used as proxies for battles between parents, and both mothers and fathers should seek to mediate peacefully disagreements about their children's futures."

The Cairo Declaration urged global leaders to *"explore bilateral and multilateral approaches to resolving family disputes, including mediation, in order to ensure that the children are not the victims."*

As judges, central authorities and practitioners in the field know all too well, there are no easy answers and sometimes no completely fair answers in cases of child relocation, particularly internationally.

Our hope and conviction is that we will seize the opportunity presented by these next three days, and that this will be more than a conference. It will be an opportunity to share experiences and insights,

learn from each other and generate real solutions. We look forward to your findings, conclusions and recommendations. We are committed to work with you to bring greater consistency, uniformity and humanity as we address these complex, difficult situations worldwide.

Hans VAN LOON*

**Secretary General, Hague
Conference on Private
International Law**



Honourable Judges and dear friends, my colleagues, William Duncan, Philippe Lortie, Juliane Hirsch, and myself are very honoured and immensely pleased to welcome you to the International Judicial Conference on Cross-Border Family Relocation, which the Hague Conference on Private International Law is co-organising with our friends at the International Centre for Missing and Exploited Children. The fact that we are able to hold this meeting here at the State Department over the next few days and with its full support is testimony to the significance of the theme from the State Department's perspective. It means that the State Department, and in particular the Office of Children's Issues, sees this issue – which is really an issue at the cross-roads of international mobility and parental conflict – as an imminently public concern: an important matter that requires international co-ordination at the government level, and also direct transnational co-operation and communication at the level of administrations and courts. I would like to thank the Secretary of State, the Assistant Secretary of the Office of Children's Issues, and in particular Deputy Assistant Secretary Michele Bond for their support, and Michele Bond and her staff for all their hard work. We are very grateful.

It is obvious that without ICMEC's support this judicial conference would not have been possible. We are very grateful to Ernie Allen for having accepted our proposal to co-organise this conference. This meeting will be essentially a brain-storming session of judicial experts, and not an event that will pay off immediately in terms of fantastic action plans and wide publicity. And it says something, I believe, of the high standards ICMEC has set for itself under Ernie Allen's leadership that it has nonetheless agreed to co-organise and generously support this conference. ICMEC is aware that the issues are complex, that there are no cheap solutions, and that there is a need for thorough analysis and discussion before we can set more concrete steps. If ICMEC had to be persuaded at all, then I am sure that our best advocate was ICMEC's Senior Policy Director, Mrs Maura Harty. Ernie Allen and I both knew her from her impressive past career as the Assistant Secretary of

State for Consular Affairs and hold her in the highest regard. Many thanks must go to Maura Harty for her enthusiasm and support. I also want to thank and express our admiration for the superb work done by the ICMEC staff. Organising a conference like this with highly positioned judges from all over the world is a logistical nightmare. You have all done an unbelievable job and we cannot thank you enough for that.

Judicial conferences are a comparatively recent addition to the Hague Conference's "toolbox". Originally the Hague Conference was set up to prepare and negotiate multilateral treaties and Conventions. Those Conventions were then supposed to find their way to the various States and it was left up to the States to implement them and up to the judges to apply them. Of course, we did some support work, such as the collection of case law, but the idea that judges would communicate, let alone co-operate, directly across borders was inconceivable during most of the last century. So a real paradigm shift was needed, especially in civil law countries, to accept this revolutionary idea.

The basis for this paradigm shift was led by the Conventions in the field of legal co-operation, the 1965 *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and the 1970 *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*. They introduced the device of the Central Authority, which worked well. The idea of the Central Authority was then transposed into the field of family law, first in the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*. These developments led to the idea of convening the Central Authorities designated under the Convention to discuss the practical operation of the Convention. The first such meeting was held in 1989.

As a next step it became clear that an international gathering of judges would also be important, if only to exchange common experiences. And that happened for the first time in 1998 at a meeting held at *De Ruwenberg* in the south of the Netherlands. It was followed by a whole range of judicial conferences for different regions, for example, Latin America and parts of Africa, for which we sometimes brought judges to The Hague. Also, establishing a dialogue among different legal systems, in particular with countries where *Shariah* law applies, is important and we did that in the context of the so-called "Malta Process".

Subsequently, the global publication *The Judges' Newsletter on International Child Protection* was created, and an international network of judges was established. Several of these network judges are now represented at this conference.

The Central Authorities are now a common feature of our Conventions and there is a provision in the most recent Conventions that calls on the Secretary General of the Hague Conference to convene at regular intervals meetings of the Central Authorities, which

* Editor's note: this speech has been transcribed from the recording of proceedings and edited at the Permanent Bureau of the Hague Conference on Private International Law

are funded under our regular budget. The status of judicial conferences is different and we depend entirely on extrabudgetary resources. So that is once again a reason why we are so grateful to ICMEC because it is inconceivable that we could have held this meeting without its support, and we are immensely grateful for that.

The theme of this conference, cross-border family relocation, is not a well-defined legal notion, at least not in many legal systems. There are statutory provisions in some systems, such as Section 13 of the English Children Act of 1989, which was mentioned by Lord Justice Thorpe, and there are some others, but they are really an exception. So, generally speaking, relocation is at best a notion in search of a legal definition at the international level and with no legal framework to handle it.

In that respect we are reminded of the history of the 1980 Hague Child Abduction Convention. The 1978 Dyer Report described the difficulties in finding suitable terminology to reflect and define the problem of child abduction, even though the practical situations which occurred most frequently were easy enough to define. As we know, the Hague Child Abduction Convention succeeded in finding the right terminology, and in defining the problem, after very careful sociological and comparative law research and very thorough discussion. The Hague Child Abduction Convention offers a criterion through which one can determine whether a relocation which has already taken place was *unlawful* and thus equals a wrongful removal. There is even a mechanism to obtain from the authorities of the habitual residence a decision that the removal was wrongful: Article 15 of the Convention, an ingenious provision. But, at this point, there are no equivalent Convention procedures available to determine, in advance, the lawfulness of a proposed relocation. In some countries an express order authorising such a relocation may be obtained. In others the parent may need to request sole custody in order to be able to determine the residence of the child, which is going beyond what is really needed perhaps.

So, one might ask oneself, is there a need for explicit and uniform Convention procedures on relocation? However, before we answer this question we need to have the full picture, and the case studies and other contributions that you have prepared for this meeting will greatly assist us in this regard. On behalf of my colleagues I would like to thank all the authors for their contributions, for the studies and for presenting the issues so clearly.

For us at the Permanent Bureau, this conference, in addition to its proper significance, serves a further strategic purpose. We are already preparing a Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, which will be held in June 2011, and one of the themes of the

Special Commission will be the interaction between child abduction and relocation. So the outcome of this conference will be of the utmost importance for the preparation of this aspect of our Special Commission.

Thank you all so very much. We are looking forward with great enthusiasm to three very interesting and exciting days, and I wish you a very successful conference.

The Honourable Patrick KENNEDY

**Under Secretary of State,
U.S. Department of State**



I am pleased to welcome you to the Department of State. While many of you have worked with us before, some of you are here for the first time. I'd like to extend a special welcome to you.

First, I would like to begin by thanking all of you for the specific role you already play in trying to improve the lives of children and families.

To the judges: Every day you see families whose legal status and emotional connections are in a dynamic state of flux. Your commitment to determining what is in the best interests of children requires disciplined legal analysis coupled with copious amounts of compassion, truly a difficult balance.

To our Central Authority counterparts: A hearty "thank you" to you as well. Through our mutual dedication to the proper functioning of the family law conventions such as the 1980 Hague Convention on the Civil Aspects of International Child Abduction, we have developed effective bilateral relationships. We are hopeful that our cooperation and coordination results in a greater number of resolutions in abduction cases. As we explore the issue of cross-border family relocation, I am certain that we, as central authorities, will find new ways to work together.

To our academic and subject-matter experts: Thank you for the work you do to inform the central authorities and courts. Your research and practitioner experience provides us with a basis to try new practice, adopt new procedures, and fashion more effective policies. We all benefit from your academic and professional endeavors and we are fortunate to have you with us today.

Last, but certainly not least, many thanks to the International Centre for Missing and Exploited Children and the Hague Conference on Private International Law – both sponsors of this event. This conference is your organizations' recognition of a gap in our communal study of the issues affecting families in an international context. When your organizations approached the Department of State to work together on this issue, we recognized the utility of studying cross-border relocation and wholeheartedly endorsed your efforts. Many thanks to the International Centre

and the Permanent Bureau for your efforts to pull this conference together.

I am encouraged that all of us have come together to consider how studying and making recommendations on the issue of cross-border relocation could provide us all with new tools to improve the protection of children. I realize that this is an intricate issue with many moving parts. I see this conference as part of the broader dialogue that we and other countries have been engaged in through the Hague process, the Malta process, and other international family law conferences.

Many of you are already aware of the Secretary's commitment to children and families. She believes that one of the tasks of the State Department is to improve the lives of children, using all of the tools at the disposal of the Department including international law and diplomacy.

She also supports the engagement of countries in an on-going dialogue. Her view is that as long as we are still talking to one another, we are more likely to gain a better understanding of one another, and thus, enhance our response to the challenges that children and families face. For her and for us, there is no higher calling for the Department of State.

Again, let me extend a warm welcome to you today. I am confident that you will have a productive and valuable conference. Again, I want to thank you for volunteering your time and effort to study this issue so that we can all improve our efforts to resolve cross-border relocation cases in the best interests of children.

Ms Michele T. BOND*

**Deputy Assistant
Secretary, the Office of
Children's Issues,
U.S. Department of State**



Thank you, Ernie and Hans. Good morning. Welcome to Washington, my home town. You have come at the most beautiful season of the year and I hope that with everything else we are accomplishing while we are here, you will have time to explore the city's monuments and visit some of the museums. There is a lot to do here. Stay as long as you can!

The U.S. Department of State is deeply honoured to host this distinguished group over the next three days. This is not the first time that we have had the privilege of welcoming some of you to a conference dedicated to identifying and promoting more effective ways to assist children and families in crisis. Many of you were in Washington in 2000, when Ambassador Maura Harty hosted a conference on child custody

* Editor's note: this speech has been transcribed from the recording of proceedings and edited at the Permanent Bureau of the Hague Conference on Private International Law

and family law. Last year, Lord Justice Mathew Thorpe organised and hosted a brilliant jewel of a conference at Cumberland Lodge, and again many of those who were present here participated in that. As Hans and Ernie have already mentioned, there have been other conferences and meetings and get-togethers through the years of people who are experts in this field and have dedicated themselves, and committed themselves to take the time to write, to engage and to carve time out of very busy calendars to travel and gather face to face for meetings like this one. They are invaluable. Each of you knows how many hundreds of hours it takes to produce the papers and presentations, to engage in consultations, discussions and training programmes, which are devoted to the issues we will grapple with again here this week.

Secretary Clinton is famous for having said that "it takes a village to raise a child". Well, this is the village that has dedicated itself to issues of family law that affect hundreds of thousands of children and families around the world: justices, judges, scholars, researchers, dedicated public servants. We are so proud to be hosting this village here in our house this week.

I would like to add my own thanks and appreciation for the work of the International Centre for Missing and Exploited Children and the Permanent Bureau of the Hague Conference on Private International Law. You have been the leaders in pulling this conference together and your work on these issues day in and day out has had a lasting impact over the years. We are deeply grateful to both organisations for the opportunity to join you in co-hosting this conference.

We know here in the United States from our experience in domestic relocation cases just how difficult and thorny an issue this is. Each parent wants to maintain a significant presence in his or her child's life and yet the direction of the two parents' lives is diverging. We have 54 jurisdictions in the United States and each of them has established criteria for evaluating and analysing relocation cases. When we add the cross-border component, the issue's complexity obviously multiplies exponentially. So the outcome of the work here will surely be a useful tool for judges, lawyers and mediators around the world as they work with parents trying to resolve this intricate, difficult and painful question of cross-border family relocation. We have our work cut out for us, so let's begin.

It is my great honour this morning to introduce Ambassador and Under Secretary of State for Management, Mr Patrick F. Kennedy, who is here at the request of Secretary Clinton to welcome you to the Department of State. Secretary Clinton would have joined us herself, but she is travelling and is today in Mexico. Ambassador Kennedy, a career foreign service officer, is one of the most senior and distinguished members of the State Department and of the Foreign Service. Currently an Under Secretary, he has also served

as Director of the Office of Management Policy, Right Sizing and Innovation. He was the Deputy Director for Management of the Directorate of National Intelligence. He has served as U.S. Representative to the United Nations for Management and Reform with the rank of Ambassador, and as Chief of Staff for the Coalition Provisional Authority in Iraq. There are many distinguished people in this building, and there is no one who is held in greater esteem by all of the building than Ambassador Kennedy. I am very happy to welcome him here this morning.

William DUNCAN*

**Deputy Secretary
General, Hague Conference on
Private International Law**



Good morning ladies and gentlemen. I am going to take you through some of the objectives we hope to meet during the course of the next two and a half days and quickly describe the programme.

There are four broad objectives.

The first and primary objective is to see whether it may be possible to find some common ground among judges from different legal systems as to the criteria which should be applied in resolving relocation or "leave to remove" applications. The issue of the criteria that should be applied, and what weight should be given to each, is challenging, but it is not the only challenge, and it is not the only objective.

The second objective is to explore the role that international judicial co-operation, and indeed other forms of co-operation, including co-operation among Central Authorities, may play, first within the process of deciding whether a relocation may occur, but secondly, and perhaps even more importantly, in helping to ensure that conditions which are attached to relocation, especially conditions relating to contact between the child and the "left-behind" parent, are respected and not lightly set aside in the country of destination. This is a really important question, and it raises issues of jurisdiction, of mutual recognition and enforcement of decisions, as well as the issue of the role and potential of direct judicial co-operation and communications in individual cases.

The third objective is to consider the value of mechanisms, including mediation, to promote agreement between parents on the issue of relocation, whether as an alternative to adjudication or integrated within the judicial process. In looking at those issues, we hope that you will also keep in mind considerations of costs and access to justice for the family members involved. We

* Editor's note: this speech has been transcribed from the recording of proceedings and edited at the Permanent Bureau of the Hague Conference on Private International Law

think that these are crucial in the context of relocation. Procedures which are costly may take up resources which are needed to meet the additional expenses which inevitably arise where relocation occurs. And if relocation procedures are, in effect, inaccessible, the parent wishing to relocate may feel trapped by a choice between involuntary continued residence with no possibility of applying to go abroad or, on the other hand, unlawful removal of the child with all its negative consequences. So please take time to consider these issues of economics and effective access which are not unrelated to the legal criteria which are applicable in dealing with relocation cases.

The fourth objective is to consider the interplay between relocation and abduction. There are a number of issues here. Some of them are very straightforward. For example, how much weight should be attached to a prior abduction by a parent who has applied for relocation? Does the fact that the parent has abducted the child previously and has been sent back under Hague procedures, disqualify him or her for relocation? The second question is this: Can the unavailability of a relocation option ever be an excuse for the unilateral removal of a child? If you are dealing with a return application and the abducting parent establishes that there was no reasonable prospect of obtaining a relocation order in the country of origin, how do you deal with that case? Also, it is important not to forget the significance for the law on relocation of the issue which is currently before the U.S. Supreme Court in *Abbott vs. Abbott*. At the international level it is the 1980 Hague Convention which offers the remedy, the order for the return of the child, where a relocation occurs in breach of custody rights under the law of the child's habitual residence. The *Abbott* case is looking at the question of how to define those custody rights, and in particular whether a right of access, when combined with a *ne exeat* provision, may constitute a right of custody for the purposes of the 1980 Convention.¹

In order to help you reach conclusions on this rather formidable range of issues, the Programme for the conference has been designed in a familiar way. First of all, we start with the research evidence. Then we look at how relocation decisions are currently being made and the impact of those decisions on the family members concerned. We then move to a tour de table in which judges and Central Authority experts explore the issues on a country-by-country basis.

There will then be a brief explanation later this afternoon of some of the principal legal instruments available and relevant in either resolving relocation cases or providing for international co-operation following relocation. Tomorrow we go into small

¹ Editor's Note: the *Abbott* Case was decided by the U.S. Supreme Court on 17 May 2010 and the judgment is available on INCADAT < www.incadat.com > - *Abbott v. Abbott*, 130 S. Ct. 1983 (2010) [INCADAT cite HC/E/US 1029].

break-out sessions in which we will discuss a number of hypothetical cases. These cases are proposed as a spring board for discussion about the issues that you think are important surrounding relocation. So those hypothetical cases are just a vehicle to encourage thought. At the end of tomorrow we will have a very important session on mediation. On the last morning we will be discussing in more detail judicial networking and direct judicial communications. We will lastly hopefully move towards some Conclusions and Recommendations.

On the documentation I do not need to say very much because our friends at ICMEC have done such a wonderful job in collecting all the materials together, and you have been so helpful in providing your papers in advance. You have the Programme, the conference papers, the hypothetical case studies, the biographies,

and a Participants List. We hope very much that the Programme will provide a good basis for a constructive dialogue over the next two and a half days.

And with that I would like to turn now to our first item, which is research and statistics, and to introduce Dr Nicola Taylor, who is a Senior Research Fellow at the University of Otago in New Zealand and Dr Marilyn Freeman, who is a Professor at the London Metropolitan University. They are real experts in this field, and the fact that they have gotten together, one from the northern hemisphere and one from the southern hemisphere, and have pooled their resources and prepared a joint paper, has resulted in the production of a very valuable synthesis of the available research. It is a great pleasure now to introduce Dr Taylor and Dr Freeman to speak on the subject of research and statistics.



*Mr Ernie Allen, Justice Sonia Maria Sotomayor,
Ms Michele Bond, Mr Hans Van Loon*

2. INTERNATIONAL RESEARCH EVIDENCE ON RELOCATION

Dr Nicola TAYLOR² and Dr Marilyn FREEMAN³

International Research Evidence on Relocation: Past, Present and Future

I. Introduction

The modern world is characterised by an increasingly mobile population as family members transfer or relocate nationally and/or internationally to pursue new career or lifestyle opportunities. It is not, of course, uncommon for separated parents to have to move in the aftermath of their relationship breakdown as they re-establish themselves in separate households and negotiate their children's care and contact arrangements. Where, however, the proposed relocation by the resident parent involves moving such a distance from the non-resident parent that visits become problematic, then the potential for a major dispute exists. This is particularly so when there has been a pattern of frequent contact (or shared care) and the non-resident parent refuses to acquiesce in the move and is unwilling to consent to changes in the contact arrangements (for example, extended school holiday visits). While these cases can be very difficult to resolve by agreement, some separated parents are able to negotiate the relocation without seeking recourse to the legal system.

However, where the ex-partners are unable to reach agreement then an application to the Court for permission for one of them to move with the child(ren)

will be required. These applications often attract strong opposition from the parent who will be left behind.

This paper reviews the international research evidence pertaining to relocation⁴. Two general points can be briefly stated at the outset. First, while there is a "very substantial research literature on the effects of residential mobility on children of divorce" (Austin, 2008, p. 137) this evidence has not yet been fully absorbed into the examination of the relocation issue in the academic / judicial arena. Second, the findings of the research that do exist are mixed, with some studies revealing beneficial effects from relocation, and others emphasising detrimental or harmful outcomes for children and young people (Horsfall & Kaspiw, 2010). Overall, however, the empirical research findings indicate "heightened risk" when a child relocates, particularly if there have been prior moves and multiple changes in family structure (Kelly, 2009, p. 36).

More recent research on the impact of residential moves on children and adolescents has demonstrated consistent negative effects on youngsters across *all family structures* (single-never married, separated and divorced, step-family, married) when compared to children in comparable groups of parents who did not move (Kelly, 2009, p. 4).

Predicting a child's adjustment to a (proposed) relocation requires a careful contextual assessment of the child and family circumstances (Austin, 2008). There are inherent difficulties in untangling relocation effects from children's adjustment to other significant family experiences (such as adversity, family discord, violence, loss and transition) that may have preceded any move. This demonstrates the urgent need for robust



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⁴ This paper has also been accepted for publication in a forthcoming issue of the *Family Law Quarterly*.

international research on the outcomes of residential mobility for children that takes better account of these variables in the relocation context, and provides more definitive guidance for parents and the Courts.

We believe it is critical to start considering relocation disputes within the broader context of inter-parental conflict more generally, rather than as a distinct phenomenon. A credible body of research has established that children of all ages are adversely affected by conflict between parents that is frequent, intense and poorly resolved (Harold & Murch, 2005). These features are especially prevalent in relocation cases and therefore need greater recognition for the risks they pose to children's development and well-being in this particular context.

We begin this paper by reviewing the key points to emerge from research on geographic mobility in intact and separated families, and then examine empirical research evidence from the USA, Canada, Australia, England and New Zealand on post-separation relocation disputes and adjudication trends in relocation case law.

II. Geographic Mobility in Intact and Separated Families

Geographic mobility patterns in intact and separated families more generally provide a useful context within which to consider contemporary understandings of post-separation relocation disputes.

A. Intact Families

In intact families the two parents, and perhaps the children, will reach the decision together as to whether or not their lives will be enhanced by moving (Goldwater, 1998). How positive this decision might be for the children most affected by it is rarely scrutinised by a third party (like a Court), yet the children are likely to experience the loss of familiar surroundings and close friendships, need to change (pre)schools and start afresh with many aspects of their lives. Importantly, however, they are not (usually) also having to deal with inter-parental conflict, nor the marginalisation of one parent, as can happen when relocation occurs in separated families.

A small number of studies have explored the impact of residential mobility on children and young people living in intact families. The more robust studies take into account the importance of socio-economic factors, the distribution of moves in the sample including the frequency of shifts, and the time duration between moves. However, the findings vary widely and therefore need to be interpreted with caution.

Several studies have found that low to moderate rates of childhood relocation within intact families can be a positive experience for children and young people. Relocations do not necessarily lead to detrimental outcomes for children and may actually enhance their resiliency in some circumstances, particularly where

positive maternal functioning and positive family relationships are evident. These studies involved shifts of 174 adolescents from English-speaking countries to Japan (Nathanson & Marcenko, 1995), and moves brought about by government employee (Edwards & Steinglass, 2001) or military transfers (Finkel, Kelley & Ashby, 2003; Weber & Weber, 2005) of American families. The social impact of relocations out of high poverty areas has also been found to be beneficial for children (Pettit, 2004). Dong, Anda, Feletti, Dube, Brown and Giles (2005) investigated the relationship between childhood experiences of relocation and poor adult health outcomes. They found no significant correlation for those adults in the study with low and moderate levels of childhood relocation (i.e. up to seven moves). However, high childhood residential mobility (i.e. eight plus relocations) was associated with a significantly increased risk of smoking, alcoholism, depression and attempted suicide. The researchers believed this relationship was accounted for by adverse childhood experiences, so high childhood residential mobility may be an indicator for risk of hidden adverse experiences, rather than an indicator of negative outcomes caused by relocation.

In contrast, other studies have concluded that relocation may be associated with harmful outcomes for children and young people. This small body of research has found significant negative associations between frequent residential mobility or high numbers of residential moves and children's psychological and social functioning and well-being. A meta-analysis of 22 relocation studies concluded that high rates of residential change were associated with increased behavioural problems during childhood and adolescence (Jelleyman & Spencer, 2008). Adam and Chase-Lansdale (2002) found that 267 adolescent African American girls from high poverty urban neighbourhoods who had experienced multiple residential moves suffered negative outcomes on a range of psychological and social adjustment variables. Significantly worse adolescent adjustment problems in the domains of education, delinquency and sexual activity were predicted by more residential moves, as well as poorer quality relationships with female primary caregivers and less kin support. Haynie and South (2005) used two waves of US National Longitudinal Study of Adolescent Health data to investigate the relationship between residential mobility and adolescent behaviour. They found that adolescents who had recently relocated exhibited more violent behaviours than those who had not recently moved. The role of peer group associations and friendships emerged as important in contributing to the violent behaviour. Young people who experience relocation may be at risk of forming new social ties with peers who engage in risky or anti-social behaviours. Haynie, South and Bose (2006) examined adolescents' reports of suicide behaviour and found that girls, but not boys, were 60% more likely to report attempting suicide within one year of moving than non-movers.

B. Separated Families

When parents separate they need to make some immediate decisions about the children's care arrangements and where they will live. They may be able to make these decisions by consensus, or require recourse to the Courts. However, in both instances, children appear to act as anchors in their parents' movement decisions. Hence, separated parents' movements tend to be 'spatially restricted' - since the existence of children necessitates the ex-partners' living in relatively close proximity so the children can continue their relationship with each parent (Smyth, Temple, Behrens, Kaspiew & Richardson, 2008). Feijten and van Ham (2007) have drawn on longitudinal survey data to show that separation does indeed lead to "distinctive spatial behaviour" (p. 645) - separated people move considerably more than those who are single or partnered long-term, but they are less likely than single or couple households to move long distances.

Distinguishing the mobility patterns of households where there has been relationship breakdown from intact families is therefore thought to be very important because:

... relocation disputes should be viewed as a particular subset of mobility more broadly, albeit giving rise to some particularly difficult issues (Smyth et al., 2008, p. 42).

These issues include the impact of the relocation dispute and decision on the child, including the marginalisation or loss of the left-behind parent when the relocation is allowed, or the distress of the residential parent when the application is refused. Relocation for children of divorce, like divorce itself, can therefore be regarded as a general risk factor for long-term behavioural outcomes (Austin, 2008).

III. Empirical Research on Relocation following Parental Separation

We begin by reviewing several empirical studies that have explored the impact of geographic mobility on child and adolescent adjustment and well-being, and parental attitudes to relocation, predominantly through cohort or survey data. These studies have been selected as examples of the research conducted in this field because they illustrate the differing types of methodologies and samples utilised, as well as the mixed nature of the findings concerning relocation outcomes for children. We then consider the key themes emerging from four qualitative studies more recently undertaken to examine parents' and children's perspectives on their experiences of relocation disputes and their impact on the family members. Finally, we review legal analyses undertaken of judicial decision-making trends in relocation cases within particular jurisdictions.

A. Cohort or Survey Based Studies

1. Norford and Medway: Norford and Medway (2002) examined the relationship between 408 American high school students' history of residential mobility (including changing schools) and their social adjustment. They identified three categories of participants: 152 non-movers; 161 adolescents who had experienced a moderate number of residential moves (i.e. an average of 3.85 moves); and 95 frequent movers who had experienced an average of 7.16 moves. In addition, 67 mothers of adolescents from the frequent relocation group were interviewed. Students who had moved in response to parental divorce participated significantly less in extracurricular activities as the number of relocations they experienced increased. Relocation following parental separation was not, however, found to be directly related to emotional and social adjustment problems in the long term. Rather, maternal attitudes to relocation were important in frequent movers' psychological adjustment. A significant relationship was found between mothers' negative attitudes to relocation and depression for young people with frequent relocation experiences. Most of those students who had moved frequently indicated they would have preferred to have moved less often, but only 26% of them reported that the frequency of their moves had had a negative impact on their lives. A third of the mothers whose children had experienced frequent moves felt that this had a negative impact on their child. The students reported that the worst aspect of relocation was leaving friends and making new friends.

2. Verropoulou, Joshi and Wiggins: Verropoulou et al. (2002) drew on a sample of 1,472 children whose mothers had been infants in the 1958 UK Cohort National Child Development Study. Relocation in response to family change, including parental separation and step-family formation, was not found to have a negative impact on children's wellbeing.

3. Gilman, Kawachi, Fitzmaurice and Buka: This retrospective study by Gilman, Kawachi, Fitzmaurice and Buka (2003) was undertaken with 1,089 adults (born between 1959 and 1966) who had experienced three or more childhood residential moves by seven years of age. Those adults with a childhood history of lower socio-economic background, family disruption and residential instability were found to be at significant risk of clinical depression prior to 14 years of age.

4. Smyth, Temple, Behrens, Kaspiew and Richardson - Parental conflict over relocation: Smyth et al. (2008) used data from the third wave of the Caring for Children after Parental Separation Project (undertaken by the Australian Institute of Family Studies) to ascertain the extent to which parents reported disagreements about relocation in the post-separation context. Participants were read a statement about various issues that could contribute to disagreements about parent-child contact:

- Money – including child support;
- The wishes of one or more of your children;
- Concerns about the ability of either of you to care for the children;
- Issues relating to a new partner (asked only if the respondent or their former spouse had repartnered);
- You or [target partner] moved or wanted to move.

The most common type of disagreement reported by separated parents was about money (67% of resident mothers; 57% of non-resident fathers). In contrast, disagreements over one of the parents moving was the least common dispute (20% of resident mothers; 33% of non-resident fathers). Yet, respondents rated these relocation disagreements as the most difficult to manage. Smyth et al. (2008) concluded that “disagreements about relocation appear to be a pincer-type issue. That is, while they might only apply to a minority, they are extremely hard issues to resolve – perhaps because there’s (literally) little room to move” (p. 40).

5. Smyth, Temple, Behrens, Kaspiew and Richardson - Attitudes to parental relocation: Significant gender differences were found in an Australian study examining separated mothers’ and fathers’ attitudes to parental relocation (Smyth et al., 2008). In the Caring for Children after Parental Separation Project, respondents were asked: ‘If a resident parent wants to move interstate with the children, should they be allowed to do this – (a) regardless of other circumstances? (b) only in certain circumstances? or (c) not in any circumstances?’

Most respondents – with the exception of fathers exercising shared care – tended to say that a resident mother should be allowed to move interstate only in certain circumstances. This category represents a kind of middle ground ‘it-depends-on-the-circumstances ...’ response. ... [T]hree of the four groups of fathers – shared care fathers, non-resident fathers, and fathers with split residence of children – were the most likely of all the groups to believe that a resident mother should not be allowed to move interstate under any circumstances (51%, 37% and 39% respectively) (in contrast to 18% of resident fathers who held this view). This represents an extreme position which would presumably argue for a blanket prohibition on (not even just a rebuttable presumption against) relocation. This ... highlights the dangers of relying on attitudinal research in policy formation. It is noteworthy that none of the shared care mothers or fathers believed that a resident mother should be allowed to move interstate regardless of the circumstances. Any significant moves by either party, of course, are likely to threaten the viability of shared care arrangements, and both mothers and fathers in these situations seem to recognise that mobility may need to be restricted where shared care is occurring (Smyth et al., 2008, p. 41).

6. Braver, Ellman and Fabricius: Braver, Ellman and Fabricius (2003) used the survey responses of 602

undergraduate university psychology students whose parents had divorced, 170 of whom had moved with one parent more than an hour’s drive away from what used to be the family home, to retrospectively examine the effects of post-separation relocation. The researchers compared students on a range of 14 financial, psychological, social and well-being measures and concluded that, compared with students whose parents did not move more than one hour away, students from families in which either a mother or father relocated, with or without the child, were worse off. Those students whose parents both remained in the same geographic vicinity had more positive outcomes than those who had a parent relocate with or without the children. There was:

... a preponderance of negative effects associated with parental moves by a mother or father. ... As compared with divorced families in which neither parent moved, students from families in which one parent moved received less financial support from their parents, worried more about that support, felt more hostility in their interpersonal relations, suffered more distress related to their parents’ divorce, perceived their parents less favourably as sources of emotional support and as role models, believed the quality of their parents’ relations with each other to be worse, and rated themselves less favourably on their general physical health, their general life satisfaction, and their personal and emotional adjustment (Braver et al., 2003, p. 214).

While Braver et al. (2003) noted that their data were not conclusive because they were correlational, not causal, it was a convenience sample, and there was no way of knowing whether the children who moved would have been better off if they had stayed, they concluded:

There is no empirical basis on which to justify a legal presumption that a move by a custodial parent to a destination she or he plausibly believes will improve their life will necessarily confer benefits on the children they take with them (Braver et al., 2003, p. 215).

It should be noted that while this is the most widely cited empirical study undertaken in this field it has been subject to considerable criticism (Bruch, 2006; Kelly & Ramsey, 2007; Pasahow, 2005).

7. Fabricius and Braver: In a follow-up study to Braver et al. (2003), Fabricius and Braver (2006) published a second study that was partially aimed at addressing criticism of their first study by re-examining the data to assess whether exposure to conflict and domestic violence might account for some of the effects indicated by the first analysis. The 602 college psychology students in the original study had been asked to indicate the level of domestic violence they had witnessed after their parents’ divorce. Half of them had also estimated the frequency of parental physical violence and the frequency and severity of conflict at points of time before and after parental separation as part of another concurrent study.

The students' reports revealed that parental conflict and violence was, on average, more frequent and severe in those situations where mothers had relocated more than a one-hour drive away from the family home, compared with paternal relocation and neither parent relocating. In responding to their critics, Fabricius and Braver (2006) reiterated their conclusion from the original 2003 study and concluded that relocation presented additional risks that were not accounted for by exposure to the conflict or violence reported in their sample. Either parent moving away from the children was a risk factor independent of high conflict and domestic violence. They therefore stood by their recommendation to discourage legal presumptions that might favour relocation.

B. Post-separation Relocation Disputes: Family Members' Perspectives

1. The Research Studies

Four qualitative socio-legal studies have recently been conducted in Australia, England and New Zealand, with the second Australian study still continuing due to its longitudinal nature. These differ from the preceding studies by virtue of their focus on parents' and children's experiences of relocation disputes in the context of the family justice system. This line of research is providing a unique perspective on the impact of relocation disputes from those most directly affected:

a. Australia – Behrens, Smyth and Kaspiw

The Australian Research Council funded Behrens, Smyth and Kaspiw (2008, 2009a, 2009b, 2010) to undertake a small-scale, retrospective, qualitative study involving in-depth interviews with 38 separated parents (27 fathers and 11 mothers) concerning their experiences of contested relocation proceedings in the Family Court of Australia (FCA), the Federal Magistrates Court or the Family Court of Western Australia between 2002 and mid-2005 (i.e. before the 2006 Australian family law reforms took effect and where the Court order had been made between 18 months and five years previously). Parents were recruited through the Courts and were classified into four groups:

- 7 successful opposers (6 fathers, 1 mother)
- 20 unsuccessful opposers (19 fathers, 1 mother)
- 6 successful applicants (all mothers)
- 5 unsuccessful applicants (3 mothers, 2 fathers and 1 subsequently successful applicant)

Twice as many parents had an order allowing relocation than not allowing relocation, and most of the participants were fathers. Thus, the dominant accounts ascertained from the in-depth interviews were those of men who had unsuccessfully opposed a relocation. The researchers caution that care is needed in interpretation of their data as it is based on only one side of the story (no ex-couple data), and has not been objectively verified through access to Court files or cross-checking of their judgments. However, the study also included an

analysis of all 200 FCA relocation decisions between 2002 and 2004 (i.e. the population from which the interview sample was drawn) and this enabled an assessment to be made of how typical their interview cases were.

b. Australia – Parkinson, Cashmore, Chisholm and Single

The Australian Research Council is funding a prospective, longitudinal, qualitative and quantitative study of relocation disputes being conducted by Parkinson, Cashmore, Chisholm and Single (Parkinson, 2008a, 2009; Parkinson & Cashmore, 2008, 2009; Parkinson, Cashmore & Single, 2010a, 2010b). The sample comprises 80 parents from 71 families: 40 fathers who all opposed their ex-partner's proposed move, 39 mothers, and one grandmother. All but one of the mothers was seeking to relocate with their children. One mother was a non-resident parent who opposed the father's proposed relocation. There are nine former couples in the sample. Nineteen children have also been interviewed from nine of the 71 families. The participants were recruited through family lawyers and have mostly been interviewed within a few months of their relocation dispute being resolved by consent or judicial determination following the 2006 Australian family law reforms. The first round of interviews began in July 2006. The families were re-interviewed 18-24 months later and, due to an extension to the project, are now being followed for up to five years after resolution of their relocation dispute. Preliminary findings have only been reported to date as Parkinson and Cashmore (2009) emphasise the project is "a work in progress" (p. 3) since the interviewing and analysis is still continuing.

c. England – reunite / Freeman

Concerned at the increasing number of relocation cases with which reunite is dealing, and the high levels of distress they create for family members, Freeman (2009, 2010) undertook a one-year research project from June 2008 to June 2009 on behalf of reunite, funded by the Ministry of Justice. Thirty-six parents were interviewed by telephone using a semi-structured interview format by the principal researcher. Both parties were interviewed in two cases, meaning the sample involved 34 separate relocation cases over a ten-year period from 1999-2009. Interviewees were obtained via the reunite database; a 'post-box' system whereby lawyers passed on reunite's request for assistance to clients who might be interested in participating in the study; a consultation exercise with organisations with a significant interest in relocation issues; and contacts made directly by the reunite Research Unit.

The sample comprised:

- 25 fathers – only two of whom were the parent seeking to relocate (one such application was granted and one was refused).
- 11 mothers – all of whom were seeking to relocate (seven of their applications were granted and four were refused).

Freeman (2009) notes that it is not surprising that there is a much higher incidence of father than mother participants in her sample as fathers are more usually the left-behind – and therefore more disappointed – parent in English relocation cases and likely to be willing to participate in research on this topic.

d. New Zealand – Taylor, Gollop and Henaghan

The New Zealand Law Foundation funded a socio-legal research team from the University of Otago to undertake a three-year study on relocation following parental separation from 2007 to 2009 (Gollop & Taylor, 2010; Taylor, Gollop & Henaghan, 2010a, 2010b, 2010c). One hundred New Zealand families where a parent had relocated (or sought to relocate) with the children, and that move would have a significant impact on contact arrangements with the other parent, were recruited through family lawyers and media publicity to take part in the study. The sample comprised 114 parents (73 mothers and 41 fathers; in 14 families both parents took part), and 44 children (aged 7-18 years) from 30 of the 100 families. It was the mothers who most often wished to move with 61 (84%) of the mothers desiring to relocate, compared to only two of the fathers. Thirty-one fathers (76%) had opposed their ex-partner's proposed relocation – 11 successfully, 19 unsuccessfully, with one case still to be determined by the Family Court. More mothers successfully relocated (39) than those who were prevented from moving or who, after parental discussion, had agreed not to move (19). The first round of in-depth, semi-structured parent and child interviews was conducted in 2007 and 2008, with the parent follow-up interviews undertaken 12-18 months later. These were completed in December 2009 – hence the study remains a 'work in progress' as data coding and analysis is still continuing. Some standardised measures were also administered with the parents to assess their child's social and emotional development and to collect demographic and inter-parental relationship data. Just over half (51%) of the families had their relocation disputes judicially determined.

2. Key Themes

The following themes emerged as important in the four studies:

a. Reason for the relocation: Most applicants had more than one reason for wanting to relocate, but the majority of relocating parents wanted to return home to a familiar environment where they had access to extended family support. Other motivations included a move to be with a new partner, to make a fresh start in a new place, to have a better lifestyle or financial prospects (especially housing affordability), or to escape violence and control.

b. Outcome of the relocation dispute: Around two-thirds of the participants in three of the studies relocated – Australia (Parkinson et al., 66%), England (65%), New Zealand (73%). However, this was not always the end

of the story as situations sometimes changed in the aftermath of the dispute. Some fathers followed the mother to her new location. Other times, mothers either decided not to go through with their move or did not shift as far as the Court had allowed. Yet other mothers returned to their original location because the relocation had not worked out for them. Despite the Court refusing their relocation, some women went anyway and left their child in the care of the father.

c. Settlement: In the Parkinson et al. Australian study, 59% of the relocation cases were resolved by judicial determination, and the remainder by consent. Many cases that did settle were resolved very late in the litigation process or after the trial had commenced. The main reason for settling was the fact that one parent gave up – the case was simply too difficult or too expensive, or the parent became concerned about the impact of the dispute on the child. A few parents – mainly fathers – settled not because they thought the proposed move would be in the best interests of the child, but because they thought that bringing the conflict to an end was in the best interests of the child. In the English study, the general tenor of legal advice to both mothers and fathers was that mothers will inevitably be granted leave to remove from the jurisdiction and that fathers should not bother to defend such applications as it is instead better to try to negotiate good contact arrangements. This means that many cases settle on the basis of the general position, rather than the position of the individual child in the particular case.

d. Legal costs: Legal costs were reported by the family members in Australia, England and New Zealand as a major source of financial stress and sometimes financial ruin.

e. Burden of travel: Some children in all three countries were enduring lengthy car, bus, plane or ferry trips to remain in contact with their non-resident parent. The cost of contact (petrol, fares) sometimes led to changes over time as parents found themselves unable to afford the trips and either reduced their frequency or altered the mode of travel. The need for a parent to accompany their child also added to the cost. Several of the New Zealand children said they wanted more frequent contact, but realised that the expense would be too great. Some overseas relocations were found to pose significant issues of cost and difficulty in terms of the travel. Non-resident parents also reported considerable expenditure in upholding the contact regime, especially when they visited the child in their new location and had to pay for airfares, accommodation, meals, rental cars and entertainment. The relocation sometimes led to fathers experiencing difficulties arranging, exercising and/or enforcing contact, and this could result in a complete breakdown of their relationship with the child. This raises the question of compliance with Court orders and illustrates why Courts need to carefully contemplate the orders they make and the possibility

they may not be able to be maintained. This is especially problematic when the relocation involves an overseas destination and the contact order has been made by the jurisdiction of the left-behind parent. It should also be noted that the burden, including the cost, of the travel arrangements sometimes emanated from unrealistic proposals by the applicant parent seeking to relocate and influence the Court in his or her favour.

f. Inter-parental relationship: Inter-parental conflict was a factor in many of the proposed relocation cases:

... while the relocation proposal appeared rarely to be the cause of conflict and deterioration in parental relationships, conflict and poor parental relationships were factors in the decision to relocate for most of the [Australian] parents who had applied to do so. ... The study tentatively suggests the predictive power of the past (Behrens et al., 2009b, pp. 244-245).

g. Allegations of violence: While allegations of violence were a feature in all four studies, it was primarily in the Australian study by Behrens et al. (2009a) that this was a major issue. A significant majority of their 38 cases involved allegations of violence and/or abusive behaviour, yet the divergence between the ways the mothers and the fathers described their experiences was stark and revealed strongly gendered discourses. Men's accounts tended to speak of violence in terms of engagement with the legal system, for example, over state protection orders obtained on weak grounds, allegations made falsely or blown out of proportion and claims about violence being used in a tactical way. The mothers' experiences of violence were a motivating issue (though not a deciding factor) in relation to their proposed relocation. Some women's accounts demonstrated the impact that the dynamics of control have and the way this can be played out in legal proceedings. Women's experiences of the response of the family law system were varied, with some experiencing recognition and validation, others feeling their concerns had been marginalised, and others being advised not to raise a history of family violence.

h. Need for a monitoring system: Some parents in England and New Zealand suggested the need for a monitoring system to be in place following the relocation proceedings. They felt it was both necessary and helpful that some form of compulsory follow-up occur after the decision in order to review what happens after a child has either relocated or stayed. It is only in this way that information about the practical effect of Court orders can be ascertained.

i. Mediation: Mediation is not an answer for everyone, and will not provide solutions in all cases, as it requires openness and a willingness to move away from polarised positions by examining the parties' issues and interests, and the options involved. Not everyone is able or willing to do this. However, it is possible that, with skilled and experienced specialist practitioners, mediation might well provide an environment in which relocation

issues can be successfully addressed, in a realistic and productive manner, as is now being achieved in cases of international child abduction in England.

j. Effect of the relocation decision: Many left-behind parents spoke of the devastation that the relocation had brought to their lives. One English father described relocation (where he had lost contact with his child) as akin to bereavement, but without the comfort of a resting place. A further general observation was that fathers were made to feel like expendable, unnecessary accessories in their child's life. Relationships between the relocated child and the left-behind parent and wider family have been severely affected. Similarly, *having a relocation application disallowed* could be equally distressing for the unsuccessful applicant. The desperation of mothers who were unable to relocate caused them misery and unhappiness because they lacked emotional and financial support and they wished, above all else, to be able to go home where they could provide a better life for their children. They generally described being required to remain living in a defined locality as an infringement of their civil rights, akin to imprisonment, even though some could understand why their child's relationship with the other parent was being prioritised at this time. Most of the New Zealand mothers anticipated 'biding their time' and making a further application to relocate when their child was older (and therefore more likely to have greater weight accorded to their views by the Court) and was facing a school transition anyway (e.g., moving from intermediate to secondary school). Some mothers whose relocations were denied made the anguishing decision to relocate anyway when either they, or the Court, decided to reverse their child's care to the other parent. Such arrangements had a high likelihood of breakdown when there were serious obstacles to their success (such as the children living with fathers who never expected to have their full-time care or who had moved into new blended family situations).

Where positive, or even neutral, inter-parental relationships existed, some New Zealand parents reported various strategies they used to manage the sometimes significant geographical distance between their homes. Each parent's willingness to recognise and encourage their child's relationship with the other parent was a powerful influence on the degree of co-operation that existed following the relocation dispute and its impact on the child. When parents could be child-centred and creative in promoting and maintaining direct (face-to-face visits) and indirect means of contact (for example, reading story books to their children over the telephone; marking a calendar with the child so they knew when the next visit/phone call would be; allowing children the flexibility to contact their non-resident parent whenever they wished) then relocation could be a much more positive experience.

k. Link between international child abduction and relocation: In the context of relocation it is argued

that if the relocation process is too restrictive parents will simply leave the country without the required consents and, if the process is too liberal, potential left-behind parents may take the child before the Court has the chance to make a relocation decision. The English findings suggest these arguments are oversimplistic and that greater account needs to be taken of the applicant's motivation and the legal and social expectations regarding the possibility of relocation.

I. Children's perspectives: While 19 children from nine of the Australian families in the Parkinson et al. study were interviewed these findings are yet to be published. It is only the perspectives of the 44 New Zealand children (aged 7-18 years) from 30 of their 100 families that are currently able to be reported. This is a small number of children from just one jurisdiction (whose parents consented to their child's participation) and illustrates the need for further research to be conducted on child outcomes and children's perspectives with larger, more representative, samples in a range of countries. For the most part, the New Zealand children were relatively happy, well-adjusted and satisfied with how things had worked out for them and their families. This is not to say that the relocation experience was not difficult or traumatic for some, but rather there was the sense that they had 'gotten over it', and moved on. This was particularly true of those children for whom the relocation issue had occurred some years previously. Two overarching themes to emerge from the many topics discussed by the children were the importance of family, and the importance of friends. Moving to be with extended family was often regarded positively, while shifting away from family and a parent, and missing them, was difficult. Family support was a factor in helping the children adjust to the relocation, especially when familiar relatives already lived in the locality (or country) to which the children were moving. A variety of contact and travel arrangements were described. Some children would have liked more contact or for their parents to live closer together. Technology, such as texting, email, Skype and MSN, was used by quite a few of the children, but many described problems with it; for example, the cost, computers not being connected or not having a webcam, slow or patchy connections, and/or lack of consistent access to such technology. Face-to-face contact was generally preferred. Children gave mixed accounts about how the relocation impacted on their relationship with their contact parent. Some thought it had made no difference, while others thought the relationship had become more distant and less parental. Having an opportunity to express their views in any legal proceedings, and being listened to, was important to the children.

C. Adjudication Trends

Moving away from social science research, one line of empirical legal research has examined adjudication trends in relocation cases decided by the Courts. Studies have been undertaken in several jurisdictions

including Australia (Behrens, Smyth & Kaspiw, 2009a; Easteal, Behrens & Young, 2000; Easteal & Harkins, 2008; Parkinson, 2008b, 2008c), Canada (Bala & Harris, 2006; Thompson, 2004), England (George, 2008) and New Zealand (Henaghan, 2003, 2008, 2009; Henaghan, Klippell & Matheson, 2000; Taylor, Gollop & Henaghan, 2010a, 2010c).

Some of these analyses seek to determine the 'success rates' for relocation applications and, with the exception of England, have generally shown a decline in the number permitted as legal systems have responded to law changes encouraging greater father involvement in their children's lives post-separation. For example:

- Following the *Gordon v Goertz* decision in 1996 through until 2004, relocation was allowed in about 60% of Canadian cases, with a small but noticeable decline since 2000 (Thompson, 2004);
- In an analysis of 58 reported Australian relocation cases from July 2006 to April 2008, Parkinson (2008b) found that the introduction of the amendments created by the *Family Law (Shared Parental Responsibility) Act 2006* had lowered the 'success rate' as relocations were allowed in only 53% of the cases. This rate was significantly lower than that prior to July 2006;
- Easteal and Harkins (2008) confirmed this drop as their analysis of 50 Australian relocation cases from 2003 to 2008 revealed a 75% 'success rate' prior to the 2006 reforms, but only 60% following the law change;
- In New Zealand, Henaghan (2003, 2008, 2009) has been tracking relocation decisions in the Family Court, High Court and Court of Appeal since 1988. When such disputes were decided under the Guardianship Act 1968, there was a 62% success rate between 1988 to 1998, 48% from 1999 to 2000, and then 38% from 2001-2003. A more recent analysis of 116 cases decided since the Care of Children Act 2004 took effect on 1 July 2005 found that successful applications to relocate within New Zealand initially dropped to a low of 20% in 2005, but then increased to 48% in 2006, went down to 42% in 2007 and 2008, and then up to 60% in 2009 (Henaghan, 2009; Taylor, Gollop & Henaghan, 2010a, 2010c). Applications to relocate overseas were generally more successful, from 38% in 2005 to a high of 70% in 2008. Overall, since mid-2005, 55% of applications to relocate overseas were successful, and 40% of applications for relocation within New Zealand were successful.

Two Australian case analyses have also looked at relocation decisions over specific periods in order to compare a range of variables (such as socio-demographic factors, proposed destinations, quality of the parent-child relationships, the children's wishes, and so forth) with case outcomes in different registries. For example:

- Easteal et al. (2000) analysed 46 relocation decisions from July 1997 to December 1998 in the Canberra

(26 cases) and Perth (20 cases) registries of the Family Court of Australia. They found that judges in Perth were more likely to allow relocations than those in Canberra;

- Parkinson (2008b), in his 2006-2008 review, found that Sydney judges were the toughest on relocation applications of all the Australian states and territories.

IV. Conclusion

Two contrasting approaches have emerged from the social science research evidence on post-separation parenting – one arguing that a child's welfare is best preserved by protecting the relationship with the primary caregiver and allowing the relocation (Bruch, 2006; Wallerstein & Tanke, 1996); and the other claiming that a child's welfare requires frequent, regular interactions with both parents (Kelly & Lamb, 2003) thus militating against relocation. In relation to the research evidence on the impact of relocation on children, Kelly (2009) asserts that relocation has detrimental consequences for children across all family types, while Horsfall and Kaspiw (2010) conclude that the findings are equivocal.

These polarised positions have not been helpful since they give mixed messages and therefore fall short in aiding our understanding about whether or not a proposed relocation might be beneficial, especially for the children. Nor do they capitalise enough on the more conclusive research evidence on the effects of high levels of inter-parental post-separation conflict on children's development and well-being (Amato, 2000; Harold & Murch, 2005; Hetherington, 2003; Kelly, 2001, 2002, 2007; Lamb, Sternberg & Thompson, 1999; Pryor & Rodgers, 2001; Schepard, 1998). Going forward, we, like others (Behrens, 2003; Parkinson et al., 2010b; Stahl, 2006), believe that it is both timely and necessary to build on this existing research base to overcome the methodological shortcomings of past studies, while also investigating more directly the link between relocation and child outcomes. We agree with Austin (2008) that children of separated / divorced parents start out at greater risk of adjustment problems following a relocation, but that whether a relocation will actually be harmful or not for an individual child depends "on the combination of risk and protective factors that may be present" (p. 140). Ascertaining the evidence base for the most salient factors that parents and Courts should be taking into account is an important next step since these cases are so fact-driven. Robust research evidence needs to be at the heart of the debate over the advantages and feasibility of achieving greater uniformity between family law systems (Duncan, 2009), and more specific efforts to establish greater international consistency in the resolution of relocation disputes.

The qualitative studies undertaken in Australia, England and New Zealand emphasise the importance of reality testing by the parties, their lawyers and the Courts when

relocation disputes arise. Within conciliation services, and the Court process, there needs to be a thorough enquiry of the motives of both parties and consideration of any feasible alternatives and their consequences (including whether or not the non-resident parent or the applicant's new partner can reasonably move). Presumptions either for or against relocation are unhelpful because the circumstances of each child and family will be different. A neutral child-centric approach is preferable and, in fact, is the direction in which more jurisdictions are moving. For example, Elrod (2006) concludes that within the USA:

... the current movement appears to be away from presumptions and towards applying a best-interests-of-the-child analysis using a variety of factors in relocation cases (p. 31).

Currently parents either need to be able to settle a relocation issue between themselves (sometimes with the help of lawyers, counsellors and mediators) or the Court needs to make the decision for them. Perhaps more parents would be able to settle before entrenched positions set in if they had recourse to more effective information. The mixed state of current knowledge does not, unfortunately, provide a sound basis upon which parents, professionals and the Courts can rely. We do not know whether, in general, relocation works well for children who adapt quickly and suffer no significant emotional loss, or whether, alternatively, relocation impacts negatively and substantially on a child's life and development and, if so, in which ways. Thinking of relocation as a 'risk context' for children means that knowledge about which familial and residential mobility factors ameliorate or elevate risk and resiliency for particular children is vital if we are to avoid the damaging effects of inter-parental conflict and hostility at the earliest possible opportunity. Such research evidence would also assist the Courts in deciding relocation cases when the parties have been unable to settle. The role of the family law system in enhancing or aggravating family relationships (both inter-parental and parent-child) in post-separation relocation contexts is therefore fertile ground for critical debate and further enquiry. As Parkinson et al. (2010b, p. 34) conclude:

It is tempting to resolve these difficult cases with the assistance of wishful thinking. That makes the decision a little easier. The value of empirical research is to help test that wishful thinking against the realities of other people's experience.

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3. JUDICIAL PERSPECTIVES ON RELOCATION

RELOCATION OF CHILDREN: LAW AND PRACTICE IN THE UNITED STATES

The Honourable Peter J. MESSITTE

U.S. District Court for the District of Maryland, United States of America



I.

It is often helpful when speaking to foreign audiences about American law and legal topics to begin with a discussion of the nature of federalism in the U.S. This is especially appropriate when addressing an audience of representatives of member countries of the Commonwealth of Nations, which share a common outlook in so many areas of law, including to some extent family law. Federalism in America comes very much into play when the topic is relocation of children with a parent following separation or divorce, where the other parent is left behind.

Our federal system is comprised of 50 different sovereign States⁵ and a strong Federal Government. The U.S. Constitution, glossed by case law and statutory enactments, determines what authority is delegated to the Federal Government and what authority remains with the States. Generally speaking, the Federal Government, quite obviously, acts in the international and interstate spheres. In contrast, each State is primarily responsible for matters that occur within its borders. Of course it is apparent that this distinction is at once too facile. Individuals and organizations constantly act across State lines, but that fact alone does not automatically result in federal jurisdiction or even federal involvement in their activities. At the same time, actions that occur wholly within a given State may implicate rights guaranteed under the Federal Constitution, such as the right to due process or equal protection of the law or some other right and, depending on the circumstances, this may very well occasion federal jurisdiction.

Against this background let us consider the matter of the parent who may or may not have sole custody of a couple's child, who with the child, leaving the other parent behind, wishes to relocate from one of the 50 States to either a remote location within the same State, a different State, or even to a foreign country. Whose law applies and to what extent does the substance of one State's law materially differ from that of another?

⁵ The District of Columbia, while not a State, shares many characteristics of a State, although in several respects, unlike States, its law making remains subject to approval by the U.S. Congress. One often speaks of the 50 States and the District of Columbia, but for the sake of simplicity, I will refer to the 50 States.

Traditionally U.S. Courts, including the Supreme Court, have said that domestic relations law – of which custody and visitation with the child are quintessentially a part – is a matter of state competence. *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). Federal authorities, including Federal Courts, do not ordinarily get involved in these matters. Each of the 50 sovereign States has the authority to decide, among other things, which parent should be awarded custody of a child in a custody dispute, and what rights of access and visitation the non-custodial parent should receive.

But, again, federal considerations, including constitutional rights, may come into play. The Supreme Court has recognized, for example, that Americans have a constitutional right to travel, certainly from State to State if not to every country in the world. *Jones v. Helms*, 452 U.S. 412 (1981); see also, e.g., *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991). A custodial parent who wishes to relocate – for reasons of employment, health, remarriage, or just for a change of scenery – enjoys the right to travel and implicitly to move, which presumably entail the right to take the child with him or her. On the other hand, the left-behind parent, who effectively loses access to a child who has moved too far away for this to realistically occur, may be denied the fundamental right of parenting⁶.

As between different States of the U.S. – the one from which a parent who decides to relocate with the child departs and the second to which the parent and child intend to relocate – how, then, is it determined which State law will decide the propriety of the move and under what conditions? Does the answer differ where the child is to be relocated from one of the U.S. States to a foreign country?

Over the years, the U.S. has attempted to come to terms with issues such as these. When relocation occurs within the same State where the parents reside, responsibility for custody and visitation are matters that invariably remain within the exclusive jurisdiction of the individual State and do not present a particularly problematic situation. And, here, as in the interstate context, which will be discussed presently, the deciding court may well cite the federal constitutional right of a custodial parent to travel, which is to say to move, balancing that against the right of the non-custodial parent to have reasonable access to and visitation with the child, without triggering federal jurisdiction.

We know, of course, that when it comes to the

⁶ The Maryland Court of Appeals put the matter this way: In a situation in which both parents seek custody, each parent proceeds in possession, so to speak, of a constitutionally-protected fundamental parental right. Neither parent has a superior claim to the exercise of this right to provide "care, custody, and control" of the children.... Effectively, then, each fit parent's constitutional right neutralizes the other parent's constitutional right, leaving, generally, the best interests of the child as the sole standard to apply to these types of custody decisions. *McDermott v. Dougherty*, 869 A.2d 751, 770 (Md. 2005).

international relocation of a parent with a child, if the matter is not amicably resolved between the parents and the relocating parent does not first seek to litigate the matter in the courts of the parties' habitual residence and instead unilaterally removes the child from that place or wrongfully detains the child in the foreign venue, the Hague Convention on the International Abduction of Children is the available (unfortunately not always effective) instrument for getting at a proper decision. See Hague Convention, October 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501. The U.S., along with some 70 other countries is a signatory to the Hague Convention, and the important point for present purposes is that the U.S. Federal Government helped negotiate, then signed this Convention, and has designated the U.S. State Department (specifically its Children's Bureau) to coordinate and assist the various States in applying the Hague Convention. Indeed, federal courts are given original concurrent jurisdiction with the courts of each of the 50 States when it comes to ruling upon these Hague Convention cases. But it is the core consideration of the Hague Convention that merits attention here. The Hague Convention does not purport to decide custody issues as to a wrongfully removed or detained child. It looks to the courts of the child's "habitual residence" before the removal or detention took place to decide that question and requires the court in the jurisdiction to which the child has been removed or detained to return the child to those courts for the appropriate custody determination. Hague Convention, Preamble. As far as the U.S. is concerned, the child must be returned to the State courts of the State which was the child's "habitual residence."

A similar concept of returning jurisdiction over custody determinations relative to the relocated child to the State of the child's habitual residence before the relocation is embedded in legislation dealing with cases among and between each of the United States. This is not primarily the result of a single federal law, however. It has come about because each of the 50 sovereign States (with slight variations from State to State) has adopted the Uniform Child Custody and Jurisdiction Act (UCCJA) or its revised version, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), both of which were drafted by the National Conference of Commissioners on Uniform State Laws, a non-governmental organization comprised of representatives from all the States that recommends uniform legislation to States in a variety of fields, in an effort to bring about greater uniformity with respect to those fields⁷. The Commission has had extraordinary success in having a number of its proposed uniform codes adopted by the several States, best known perhaps being the Uniform Commercial Code or indeed

the Uniform Child Custody and Enforcement Jurisdiction Act. But, as with the Hague Convention on Child Abduction, the UCCJA and the UCCJEA deal with the resolution of jurisdictional disputes as between courts of different States; they do not establish the factors that courts are to consider when passing on the merits of custody and access or visitation claims. While, as to those matters, virtually all States, substantively speaking, follow the "best interests of the child standard," it is left to each State to define the specific relevant factors that define that standard.

What is most interesting, however, is that in recent years the Uniform Law Commission (ULC) attempted to draft a Relocation of Children Act, including a lengthy provision dealing with "Factors (to be) Considered⁸." But only very recently, as it happens, the Commission gave up the effort. In her letter to the Chairperson of the Drafting Committee, dated February 10, 2009, the President of the Uniform Law Commission explained why:

... given that the various interest groups are contentious and the states have adopted varying approaches on how to deal with the issue of relocation of children, the members of the Scope and Program Committee and Executive Committees were concerned that any act drafted by the ULC on this subject, no matter how much an advancement of the law, would not be enacted in a significant number of states.

This perhaps is the most succinct summary of how the matter of relocation of children stands in the U.S. The experts have simply been unable to devise a set of universally acceptable principles to apply to these cases. That said, however, among the several States there are still a few basic approaches to common issues that can be addressed, none of which is self-evidently better than another, and all of which, taken together, point up the essential problem areas pertaining to child relocation in any interjurisdictional setting.

II.

A) U.S. literature dealing with the relocation of children by the custodial parent is extensive – ranging from pure legal analysis to statistical emotional/psychological studies. Suffice it to say that a fair number of custodial parents (or those seeking to assert sole custody for the

was carried forward in the UCCJEA, introduced in 1997 to correct deficiencies in the UCCJA as well as to bring the UCCJA into compliance with a federal law, the Parental Kidnapping Prevention Act, which had been enacted by Congress in 1990 also to address deficiencies in the UCCJA. As of early 2009, all but a few States had enacted the UCCJEA and as to those few, adoption of the Act was under consideration.

⁸ In 1997, the American Academy of Matrimonial Lawyers (AAML) also proposed a Model Relocation Act which has not been adopted by any State. The Act also contains an extensive list of factors to determine contested relocation. See American Academy of Matrimonial Lawyers, Proposed Model Relocation Act (1997), at § 405, available at <http://www.aaml.org/go/library/publications/model-relocation-act/> [hereinafter "AAML Proposed Model Relocation Act"].

⁷ The Uniform Law Commission, organized in 1892, has drafted more than 250 uniform laws on numerous subjects and in various fields of law. Many of these have been adopted. Following its introduction in 1968, the UCCJA was eventually adopted by all 50 States and provided that a court has jurisdiction to make a child custody determination when the State of that court has been the child's "home state" within 6 months before commencement of the proceeding. That concept

first time where it has not previously been established) will always relocate and will choose to do so for a number of reasons, from the more compelling (e.g. a parent in the military being posted out of State) to the less compelling (e.g. moving to Florida where there is no state income tax, the sun always shines, and “the livin’ is easy”). And all relocations will invariably have some negative impact on both the child and the left-behind non-custodial parent. Participation of the non-custodial parent in the child’s life is diminished and the child – depending on his or her age – has to leave a circle of friends and established activities, then adjust to what may be a new and unfamiliar environment. Visitation schedules that have to be arranged can be cumbersome. But these are precisely the sort of factors which in the particular case will be weighed by the courts and that, depending on the specifics at hand, may influence them in approving the relocation, with or without conditions, or not approving it at all.

For the time that remains I propose to focus on the principal areas that have concerned American legislatures and courts when considering the matter of child relocation:

- What sort of notice of a proposed relocation, if any, must a relocating parent give to a non-relocating parent?
- Who has the burden of proving that relocation of the child should or should not be allowed?
- Do any presumptions come into play?
- What factors are relevant with respect to the proposed relocation?
- What factors are appropriate to consider in opposition to the relocation?

B) Bear in mind that there are at least 37 States that have statutes on the subject of child relocation, ranging from the very brief, e.g. Massachusetts has a single section with two sentences, while Alabama has 20 sections containing 17 factors.⁹ The rest of the States have developed standards for relocation through case law established by their highest courts.

III.

A) Notice of Proposed Relocation and Objections to Proposed Relocation

As of 2008, 19 of the 37 States with relocation statutes required the custodial parent to give the non-custodial parent some form of prior written notice of the contemplated move. Common courtesy, of course, would seem to dictate that comparable notice be given in every state, whether or not required by statute, and, indeed, the failure to do so could conceivably become a factor that the court takes into account in determining

whether the relocation of the child should go forward or whether custody or visitation should be modified.¹⁰ Some States, e.g. Maryland, only require prior notice of relocation if the court has included it as a condition in a custody or visitation order. Notice statutes vary from State to State, but the required information tends to be similar from State to State. Ideally notice would contain:

- the specific new proposed residence address;
- the new telephone number of the relocating parent;
- the intended date of the move;
- a brief statement of the reasons for the intended move;
- a proposal for a revised schedule of visitation by the non-relocating parent with the child;
- a warning that within some time period, e.g. between 30 to 90 days, the non-relocating parent who wishes to challenge the move must file an objection with the court, with the further indication that, should no objection be filed, the relocation may take place; and
- a suggestion that the proper court should be solicited to hear the matter on an expedited basis.

B) Presumptions and Burden of Proof

The next prominent issue in relocation cases in the U.S. has to do with burden of proof – who has it? Does the custodial parent have to demonstrate the propriety of the move or is it the non-relocating parent who has to show the impropriety? Or is the burden of proof equal? In some States, this question is answered by indulging certain presumptions. “The burden of proof or presumption applicable to relocation cases are the most controversial issues regarding the law of relocation.”¹¹

The standard proposed in the now archived draft of the ULC Relocation of Children Act would establish no presumption either in favor of or against relocation of the child.¹² Both parents would bear the burden of proving whether or not relocation is in the best interests of the child. But in actual practice the States have taken contrasting positions on the question, demonstrating no doubt why the Uniform Law’s proposal of a neutral burden met its demise. In the past, some courts took the position that because removal of a custodial parent would deny the non-custodial parent access to the child, the relocation should be denied, in effect acknowledging a presumption against removal.¹³ At least one state, Alabama, still has a presumption against relocation. Beginning in the mid-90’s, however, the trend was toward a presumption in favor of the move by the custodial parent, based in many instances upon recognition of the constitutional right of the custodial parent to travel and move and/or upon the importance of *res judicata* insofar as past court decisions regarding

⁹ This tabulation and those that follow are taken from National Conference of Commissioners on Uniform State Laws, Relocation of Children Act (Draft, Oct. 28, 2008), available at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm> [hereinafter “ULC Draft Relocation of Children Act”].

¹⁰ See, e.g., AAML Proposed Model Relocation Act, *supra* note 4, at § 206(1).

¹¹ ULC Draft Relocation of Children Act, *supra* note 9, at § 8.

¹² *Id.* at Comment.

¹³ See “Relocation of Children by the Custodial Parent,” 65 AM. JUR. *Trials* § 127 (1997 & Supp. 2009).

custody are concerned, both acknowledging the inherent right of the custodial parent to make decisions on behalf of the child, including where the child should live.¹⁴ Approximately four states, e.g. Oklahoma, have a presumption in favor of relocation and, what essentially comes to the same thing, five more, including California, place the burden of proving the impropriety of the relocation on the party opposing relocation.

Among those states which do not establish presumptions, eight, e.g. Florida, provide for a split burden of proof: here, the party seeking the move must first show a good faith reason for the move; the burden then shifts to the non-custodial parent to demonstrate why the move is not in the child's best interests. Ten States, including Illinois, place the burden of proof on the party seeking relocation. Finally, six States, including New York, either by statute or case law, track the recommendation of the Uniform Law Commission and entertain no presumptions, providing for an equal burden of proof.

One could of course debate the policy choices endlessly, which I do not propose to do so in this presentation. I would, however, invite consideration of the words of the New Mexico Supreme Court in *Jaramillo*:

... [A]llocating burdens and presumptions in this context does violence to both parents' rights, jeopardizes the true goal of determining what in fact is in the child's best interest and substitutes procedural formalism for the admittedly difficult task of determining, on the facts, how best to accommodate the interests of the parties before the court, both parents and children 823 P.2d at 305.

C) Factors to Consider in Determining the Propriety or Impropriety of Relocation

This, of course, is the heart of the matter. What considerations militate in favor of relocation and what factors against? Even where by law there is a presumption in favor of relocation or the non-custodial parent has the burden of proving that relocation is contraindicated, the primordial question will almost always be – is the proposed move to be made in good faith? Again, some reasons are more compelling than others – the posting of a custodial parent in the military overseas is obviously more persuasive than the decision of the custodial parent to seek a new life, far away from the old, with no job prospects, family or friends nearby.

Almost certainly the concern next in importance is whether the non-custodial parent will be able to maintain reasonable access to and visitation with the child. Insofar as the parents possess the financial means, this tends to be an easier case. The child can be sent back to the non-custodial parents for periodic visits, some more extended as, for example, over school vacations. Modern technology, such as Skype videos which allow face-to-face video contact via computer,

¹⁴*Id.*

can augment the personal contact. The problem, however, intensifies to the extent that the parents lack the financial resources to send the child back and forth with any frequency. There the issue of whether the child should be permitted to relocate or stay becomes more problematic.

The AAML and ULC Model Acts have formulated lists of specific factors for courts to consider (or not consider) in making their judgment, and all of these, in one form or another, tend to recapitulate considerations that have informed the decisions of various courts over the years. The most central of these considerations, as set forth in the ULC Draft Relocation of Children Act, are: (a) "the quality and relationship and frequency of contact between the child and each parent;" (b) "the likelihood of improving the quality of life for the child;" (c) "the views of the child" (depending on the child's age and maturity); and (d) the "feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the child."

Other factors tend to be a subset of these core inquiries, e.g. whether, for example, in making the move or opposing it, either parent is acting out of spite; whether there has been a history of domestic violence or threats of domestic violence; what is the distance involved in the move; and the proximity, availability and safety of travel arrangements. The list is not exhaustive. Indeed, a widely cited article by Judge W. Dennis Duggan that appeared in the April 2007 issue of the Family Court Review lists 36 relocation factors that he gleaned from the leading cases and statutory factors, none of which, he noted, "specifically mentions parks, schools, or weather." W. Dennis Duggan, *Rock-Paper-Scissors: Playing the Odds With the Law of Child Relocation*, 45 FAM.CT.REV. 193, 209–10 (2007). These 36 factors are listed in Appendix A to this paper. As Judge Duggan points out, of course, the factors are "not all of equal weight and in different cases the same factor may have different weight."

This brief review, then, suggests the possible vortex into which American parents contesting relocation of a child may find themselves, with all its attendant misery and cost. Obviously, an amicable agreement or even alternative dispute resolution are much preferable. But contested cases will continue to be brought and courts will presumably continue to do their utmost to decide them fairly and reasonably. Nominally speaking, they will continue to espouse the "best interests of the child" standard. But, of course, under that standard the result will often not be in the best interests of one or the other of the parents and that fact alone is likely to bring at least some grief to the child. Perhaps the most that courts in the U.S. and elsewhere can hope for is that they will be able to render decisions, if not in "the best interests" of the child, in the "overall interest of both the child and the parents."

APPENDIX A

THE 36 FACTORS IN CHILD RELOCATION CASES*

- 1) Length of the parent-parent relationship
- 2) Length of the parent-child relationship
- 3) Were the parents married?
- 4) Parents' time-sharing agreement
- 5) Quality of parenting time
- 6) Quantity of parenting time
- 7) Age, maturity, and special needs of the child
- 8) Reason for the move
- 9) Reason the staying parent objects to the move
- 10) The advantages of the move to the moving parent
- 11) Advantages of the move to the child
- 12) Disadvantages of the move to the staying parent
- 13) Disadvantages of the move to the child
- 14) Travel time and cost of travel
- 15) The demands or benefits of the moving parent's second marriage/relationship
- 16) Feasibility of a parallel move by the staying parent
- 17) Feasibility of a move by the moving parent's new husband or significant other
- 18) Does the staying parent really want custody?
- 19) Is a change of custody practical?
- 20) Can meaningful child access for the staying parent be provided if the move is allowed?
- 21) Will the moving parent comply with the access order?
- 22) The effect of the move on extended family on both sides
- 23) Personal misconduct by either parent
- 24) The preference of a mature child
- 25) Any agreement between the parents about relocations
- 26) The child's adjustment to home, school, and community
- 27) The length of time the child has lived in a stable environment
- 28) The financial resources of the two family units
- 29) The expected permanence of the new custodial environment
- 30) The mental and physical health of all persons in the two family units
- 31) Continuation of the child's cultural and religious heritage
- 32) Ability of the parents to cooperate with each other
- 33) Ability of the moving parent to foster the child's relationship with the staying parent
- 34) The effect on the child of any domestic violence
- 35) Any false allegations of sex abuse?
- 36) The citizenship status of the parents and the child

* Taken from W. Dennis Duggan, *Rock-Paper-Scissors: Playing the Odds With the Law of Child Relocation*, 45 FAM. CT. REV. 193, 209-10 (2007).

CHILD RELOCATION – LAW AND PRACTICE IN THE UNITED STATES: A SUPPLEMENT¹⁵

This paper is a Supplement to a paper on child relocation law and practice in the United States, prepared for a conference held in London in August 2009. Since that time the law governing child relocation among the several States has not changed substantially. The same legal concepts described in the main paper – notice requirements, presumptions, and factors relevant to evaluating a proposed relocation of a child – continue in effect.

This Supplement addresses two areas not addressed in the main paper: how judges and practitioners view child relocation disputes, and, more specifically, the extent to which alternative forms of dispute resolution are being used in these cases. Research for this Supplement included a review of relevant literature as well as interviews with judges, domestic relations masters, mediators, and practitioners in Montgomery County, Maryland, a large suburb of the District of Columbia.¹⁶ Relocation cases tend to be more common in Montgomery County in comparison to other areas in the United States, because of the high mobility of residents of the District of Columbia Metropolitan area. As a world capital, the area has a significant concentration of military personnel, diplomats, politicians, and individuals from other jurisdictions, such as those working at the World Bank.

¹⁵The author is grateful for the extensive research assistance provided by Michelle Albert, a third-year student at the University of Maryland Law School.

¹⁶The following people were consulted:

- Honorable Cynthia Callahan, who practiced family law for twenty-five years in Maryland before becoming a Judge of the Circuit Court for Montgomery County in 2009;
- Honorable Steven G. Salant, who has been a Judge of the Montgomery County Circuit Court since 2008 and who served as a Family Division Master of the Court for thirteen years;
- Honorable Mary Beth McCormick, who was a District and more recently a Circuit Court Judge in Montgomery County for a total of thirteen years and who as of this writing is on a family court rotation as a Judge of the Circuit Court;
- Honorable James L. Ryan, who was a District and Circuit Judge in Montgomery County for sixteen years and before that a Domestic Relations Master for five years and who now does mediation for the court and through a private practice at the McCammon Group, a leading provider of mediation services in the Mid-Atlantic Region;
- Honorable S. Michael Pincus, who was a District and Circuit Judge in Montgomery County for sixteen years and before that a Domestic Relations Master for three years and who now does pre-trial mediation for the Court;
- Master Charles M. Cockerill, who is a Family Division Master for the Montgomery County Circuit Court;
- Melissa Henderson, who is a Family Division Mediator for the Montgomery County Circuit Court and who has had over twenty-five years of mediation experience;
- Monica G. Harms, Esquire, a principal at the law firm of Stein, Sperling, Bennett, De Jong, Driscoll & Greenfeig, PC, in Rockville, Maryland, who practices primarily family law; and
- Bruce E. Avery, Esquire, and Suzanne Ryan, Esquire, respectively a partner and an associate at the law firm of Avery & Upton, in Rockville, Maryland, who handle litigation, mediation, and negotiation in the area of family law.

Both the literature and those “in the trenches” share virtually all the same conclusions. The first universal conclusion is that child relocation is one of the hardest issues to resolve.¹⁷ The stakes are particularly high because an interstate or international relocation of a child frequently eliminates the non-relocating parent’s relationship with the child, or at least will substantially interfere with the relationship.¹⁸ Unlike other child custody or visitation cases, there is rarely a middle ground in relocation cases: either the parent gets to relocate with the child or the parent does not. A factor complicating relocation cases, according to judges and attorneys, is that the disputes are often between two parents, both of whom are much involved with the child. Less involved parents tend to be less likely to contest a proposed child relocation and more likely to settle these matters.

Even so, mediation has been looked to increasingly to resolve child relocation disputes,¹⁹ having gained popularity in child custody disputes and family disputes in general.²⁰

Several states have incorporated mediation into their family dispute resolution regimes. California, for example, mandates mediation in child custody and visitation disputes.²¹ Other states, such as Virginia, grant courts discretion to refer appropriate cases to mediation. In Montgomery County, Maryland, the first step in family dispute resolution is a “scheduling hearing” held before a Domestic Relations Master.²² At that juncture, unless the case involves domestic violence, the court can decide to refer child custody and visitation cases to mediation prior to trial by court order regardless of the parties’ interest in mediation. And if pre-trial mediation fails and the case goes to judgment, the court may offer post-judgment mediation services, so long as both parties consent before it is done. If successful, mediation through the Montgomery County court system results in a signed consent order.

¹⁷See in particular *RELOCATION ISSUES IN CHILD CUSTODY CASES 2* (Philip M. Stahl & Leslie M. Drozal eds., 2006).

¹⁸Two judges explained that Skype, i.e., electronic video conferencing, and social networking websites, such as Facebook, have helped in relocation cases because these technologies allow non-relocating parents to maintain regular contact with their children even after a substantial relocation. There never, of course, is any real substitute for in-person contact.

¹⁹Robert E. Emery et al., *Divorce Mediation: Research and Reflection*, 43 FAM. CT. REV. 22, 22 (2005).

²⁰*Id.*; Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659, 659 (2008).

²¹Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?*, 52 CLEV. ST. L. REV. 499, 514–15 (2005).

²²Montgomery County Government, Child Custody and Access Mediation Program, http://www.montgomerycountymd.gov/cibtmpl.asp?url=/Content/CircuitCourt/Court/FamilyDivision/Mediation_Program/Mediation.asp#_Mediation_Process (last visited Feb. 9, 2010); Montgomery County Government, Family Division Services, <http://www.montgomerycountymd.gov/cibtmpl.asp?url=/content/circuitcourt/Court/FamilyDivision/FamilyDivision.asp> (last visited Feb. 9, 2010).

At the same time, parties may also independently consult private mediators; in the United States, many practitioners and retired judges offer such services, including in the child relocation context.²³

That said, both the literature and practitioners concede that mediation has had modest results in resolving child relocation disputes.²⁴ Again, quite simply, parents’ unwillingness to compromise in relocation cases makes these cases very difficult to mediate. But practitioners and judges identify other factors that tend to make relocation cases more difficult to mediate. Different cultural norms, for instance, can complicate the cases. Because at least one non-American parent may be involved, the cultural norms of that parent may be particularly influential. In some foreign cultures, such as those based in the Middle East, males are viewed as the dominant, hence invariably prevailing parent. A Muslim parent may insist on a Muslim upbringing for a child whose other parent is non-Muslim. In such cases, it has been difficult to convince parents to view each other as bargaining equals, an obvious hindrance to a mediated solution. Additionally, when relocation disputes involve young children, say between 5 and 12 years of age, there tends to be less room for compromise, since children in this age group often require more constancy and a home base than infants and older children.

Practitioners did observe, however, that certain factors, such as financial resources, may lead to more successful mediation in child relocation disputes; that is, financial resources are more likely to result in compromise. One Montgomery County judge cited a case where a parent who opposed a relocation had substantial financial resources and offered to pay for a nearby apartment for the relocating parent in an effort to convince the relocating parent to let the child stay behind with the non-relocating parent. This proposal proved successful.

Financial resources also allow parents to fund travel, which makes the possibility of compromise significantly more likely. One judge reported a highly successful mediation in a case where one parent wished to relocate with the children from the United States to Canada, where the parents agreed in advance on funding to send the children to Canada for summers. In contrast, the prospects of compromise lessen substantially when parents have limited financial means.

Practitioners and judges have also found certain types of parents more likely to engage in successful mediation. More mature parents – those who embrace the concept of fair mediation from the outset – are among these. At the same time, if one parent is especially sensitive to the emotional welfare of the child, he or she may be willing to take an extra step in the interest of reaching a compromise. Practitioners and judges have seen that

²³See, e.g., Carol Gersten, *Mediate the Move: Quelling Clients’ Fears and Clarifying Options*, 28 FAM. ADVOC. 30, 31–33 (2006) (advocating mediation in the child relocation context).

²⁴E.g., *RELOCATION ISSUES IN CHILD CUSTODY CASES*, *supra* note 17, at 2.

wishes of the child and the experience level of the mediator may also affect the likelihood of successful mediation in these disputes.

Litigation of course, continues to be the main method of resolution for child relocation disputes, often with less than fully satisfactory results. Despite this, judges and practitioners uniformly agree that mediation still generally leads to better outcomes. Why? One particularly seasoned judge explained that parties “get to eliminate the gambling element [of litigation] and get to participate” in crafting the outcome. Instead of having a stranger fashion the result, as in litigation, mediation empowers parents to develop a mutually desirable solution.²⁵ Mediation can also avoid the detrimental effects of litigation, which may include custody evaluations for the child, hurtful comments between parents and in front of children, and heightened conflict and distrust that can undermine all future family interactions.

A Domestic Relations Master has opined that mediation, as opposed to litigation, can result in better outcomes for parents of a lower economic status, who are less likely to be able to afford counsel. A mediator’s goal is to help both sides communicate and develop a mutually desirable parenting plan, regardless of whether the parties are represented by counsel. In contrast, unrepresented parties in litigation often have difficulty understanding court proceedings,²⁶ and in consequence obtaining a favorable outcome in litigation.

Finally, even when mediation is not successful, there is still good reason to find virtue in it. During the process, mediators may be able to clear up misunderstandings between the parents, encourage clearer communication between them, and at least move them in the direction of common ground.²⁷ If the result is to preserve continuous, conflict-free (or a seemingly conflict-free or less conflicted) contact between both parents and the child, it is, as the saying goes, “worth keeping the lights low, so as to give the ghosts a chance.”

CHILD RELOCATION – LAW AND PRACTICE IN THE UNITED STATES: ANNOTATED BIBLIOGRAPHY

Cases

Hollandsworth v. Knyzewski, 109 S.W.3d 653 (Ark. 2003): The Supreme Court of Arkansas discusses the

²⁵Research has also found a trend of greater compliance with mediated orders. Emery et al., *supra* note 19, at 27.

²⁶Steegh, *supra* note 20, at 670.

²⁷Teaching has become a growing part of family dispute resolution. Some family dispute resolution systems currently incorporate parenting education programs. *Id.* at 661. For instance, Montgomery County Circuit Court offers Co-Parenting Skills Enhancement classes. These classes teach parents how to communicate effectively, as well as how to act in a way that will be less damaging to their children after a divorce or separation. Montgomery County Government, Parent Education and Custody Effectiveness Program, http://www.montgomerycountymd.gov/cibtmpl.asp?url=/Content/CircuitCourt/Court/FamilyDivision/CoParenting_Program/CoParenting.asp#_What_is_PEACE (last visited Feb. 9, 2010).

various ways in which other states have handled child relocation disputes.

In re Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005): The Supreme Court of Colorado compares the three different approaches used by the highest courts of Wyoming, Minnesota, and New Mexico, and decides that the approach used by New Mexico best comports with Colorado law.

Lenz v. Lenz, 79 S.W.3d 10 (Tex. 2002): The Supreme Court of Texas examines a child relocation issue as an issue of first impression, reviews how other states have handled this issue, and describes in detail several important cases from other states, including cases from the highest courts of California, New Jersey, and New York.

Proposed Rules

American Academy of Matrimonial Lawyers, Proposed Model Relocation Act (1997), available at <http://www.aaml.org/go/library/publications/model-relocation-act/>: The American Academy of Matrimonial Lawyers (AAML) currently consists of approximately 1,600 family law attorneys in 50 states. The AAML crafted this proposal to serve as a template for state legislatures. At least one state, Louisiana, has based its relocation statutes on the AAML’s proposed act. See, e.g., *Curole v. Curole*, 828 So. 2d 1094, 1096 (La. 2002). The Act contains a number of substantive provisions relating to notice, objection to relocation, court orders, and factors to be considered in court determinations

AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.17 (2002):

The American Law Institute (ALI) articulates a series of principles applicable when relocation constitutes “changed circumstances” warranting modification of a parenting plan. For an evaluation of the ALI’s principles on child relocation, see Janet Leach Richards, *Relocation Issues Pursuant to the ALI Family Dissolution Principles: Are Children Better Protected?*, 2001 B.Y.U. L. REV. 1105.

National Conference of Commissioners on Uniform State Laws, Relocation of Children Act (Draft, Oct. 29, 2008), available at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm>: The Relocation of Children Act, which never progressed beyond the draft stages, includes many substantive provisions, some of which address notice, objections to relocation, burdens of proof, and remedies. This Act identifies eleven factors that courts should consider when deciding whether a proposed relocation is in the best interests of a child.

Secondary Sources

65 AM. JUR. *Trials* § 127 (1997 & Supp. 2009): From AMERICAN JURISPRUDENCE TRIALS, an encyclopedic guide to litigation; this article provides a comprehensive overview of the subject of relocation of children, describes the status of the law on this topic in almost every state, discusses such other issues as how to oppose

a parent's relocation efforts and what to consider when evaluating a parent's motion for removal.

Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245 (1996): Describes child relocation statutes and leading cases from a number of states. Good overview of how various states are resolving child relocation disputes.

W. Dennis Duggan, *Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation*, 45 FAM. CT. REV. 193 (2007): Discusses leading relocation cases from New York, Massachusetts, California, Canada, England, and Australia. Also compiles 36 relocation factors from over 60 state and international court decisions and a number of statutes from these jurisdictions.

Carol Gersten, *Mediate the Move: Quelling Clients' Fears and Clarifying Options*, 28 FAM. ADVOC. 30 (2006): One of the few articles that discuss mediation in the child relocation context. For more information about mediation and other forms of alternative dispute resolution that are being used to address child custody disputes, see Robert E. Emery *et al.*, *Divorce Mediation: Research and Reflection*, 43 FAM. CT. REV. 22 (2005); Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659 (2008).

Robert Pasahow, *A Critical Analysis of the First Empirical Research Study on Child Relocation*, 19 J. AM. ACAD. MATRIM. LAW. 321 (2005): Summarizes Judith Wallerstein's research to the effect that it is in children's best interests to allow custodial parents to relocate with their children, and reviews research contradicting Wallerstein's findings. Also presents the results of an empirical study that examined the effects of parent relocation on children. For more information on Wallerstein's research and commentary, see Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305 (1996).

The Right Honourable Lord Justice Mathew THORPE*

Head of International Family Law, England & Wales



I would like to begin by expressing my profound admiration for the achievement of the Hague Conference and of ICMEC, in getting this Conference together. It is unprecedented that Judges should be brought together for the purpose of discussing something that they have it within their power to achieve. In no small measure because the law that we are discussing is, broadly speaking, Judge made and not Parliament made. And so, just as we have made a situation, so we have the power and the responsibility to evolve, and this Conference gives us that opportunity. And it seems to me that we have to grab it with both hands. Now, Washington is particularly appropriate because it is not the first time that the United States has hosted a Conference in Washington. Let us not forget that it was the U.S. State Department that hosted the Conference for Judges in 2000, a Conference limited to a small number of common law States. But it is, I think, important just to see that even in the year 2000 we passed a Resolution which said "Courts take significantly different approaches to relocation in cases which are occurring with a frequency not contemplated in 1980 when the Abduction Convention was drafted. Courts should be aware that a highly restrictive approach can adversely affect the operation of the Convention." Ten years ago we were recognising the problem. Surely it is time for us now to resolve it.

The first thing that I want to say is that the jurisprudence in London is probably the first in time. I doubt that any other country here can show a seminal statement of the principles to be applied in relocation cases earlier than the year 1970 when the Court of Appeal decided the relatively modest case of *Poel v. Poel*. But the principles that the Court expressed in 1970 have been consistently upheld over the following 40 years. Now, why is that? In part it is because one of the principles of our jurisprudence is *stare decisis*. A bit of Latin, but we all know it means that you have to follow the precedent, and since the issue of relocation has never been considered by the House of Lords, it is at the level of the Court of Appeal that, year in, year out, the Judges have applied loyally the principles enunciated in *Poel*.

Now, as recently as five years ago, I was delivering the lead judgement in the case of *Payne*, which again upheld the principles in *Poel*. Would I do so again now in 2010? Exposing my heart, I have to say that I do not think that I would, and that is because the movement in the international market has demonstrated how isolated we have become in our stated and applied principles.

*Editor's note: this speech has been transcribed from the recording of proceedings and edited at the Permanent Bureau of the Hague Conference on Private International Law

Now, of course, London is, as it were, the mother of the common law, and many jurisdictions will look to authority in London as the starting point for discussing where they should be, where they should go. And accordingly the decision in *Poel* has been considered across the common law world. And it is notable that leading common law jurisdictions, Australia, New Zealand, and Canada have chosen not to follow the approach in *Poel v. Poel*, and accordingly we are out of step. And the question is, can we, as it were, beat a graceful retreat? Well, I am sure that we can. Those of us who have not been appointed Judges from University have preceded our judicial experience with years of hard graft as advocates, and I am at heart still an advocate. So I ask myself the question, if I had the brief in an appeal, the objective of which was to upset the order in *Poel v. Poel*, how would I go about it? I have seen a way which as an advocate I think might well succeed. And the ratio is this, that when the case of *Poel v. Poel* was decided, we were living in an age when, post-divorce, there was no such concept as parental responsibility. The idea of a father sharing in the task was completely unknown, and the most influential judgement in *Poel* opens with this proposition: that when a marriage breaks up, a situation normally arises when a child of that marriage instead of being in the joint custody of both parents must of necessity become one who is in the custody of a single parent. So post-divorce in 1970, if the parties could not agree, it was the task of the Judge to award custody to one only of the parents. And any splitting of that function was considered to be contrary to the welfare of the child. And the selected parent was then vested not only with a large responsibility, but a very large power. And accordingly it seemed to the Judges of that day simply inconsistent with good sense to deny the parent who had taken that responsibility, and who had that power, the right to choose where he or she would exercise it, and in almost all cases it was she and not he. And it was in that climate that the decision in *Poel* was formulated. Of course we are now living in a completely different world. Quite apart from powerful pressure groups mounted by fathers, it is universally acknowledged that the responsibility both before and after divorce is a shared responsibility. And accordingly, it seems to me that there is a way to unpick this now almost archaic decision.

There are a number of other points I wish to make. One is that none of the London cases has ever resulted from any consideration of expert evidence. Now, expert evidence could come from two sources. It could come from social science research such as the wonderful review of the literature that we have heard this morning, but it could also come from the mental health division, the expertise in mental health is a hugely important construct in London. For many years, consultant child and adolescent psychiatrists have contributed to the judicial task of identifying welfare. And in a parallel situation where the Court of Appeal was faced with the question of – to what extent domestic violence

in the history of a family impacts on decision-making as to future contact, the Court of Appeal was hugely assisted by collaboration which enabled two leading child psychiatrists to submit a report to the Court on the impact of domestic violence on the development and welfare of the child. Something parallel would be, it seems to me, a necessary ingredient of a fully rounded interdisciplinary conclusion on these difficult issues.

I would also just like to make the point that for us there is no such thing as internal relocation. We are, as you will appreciate, a very small island with a very large population, and accordingly the parent who has the residence order may almost always choose where within the jurisdiction he or she may wish to live without the fetter that applies if the choice crosses the border into some other jurisdiction.

I want to impress upon you, and this may be my last word, that there is a huge amount of public concern in my jurisdiction on this issue. We have had strident fathers' rights groups, from Fathers for Justice through to the highly respected Families Need Fathers. There emerged a few years ago a group that calls themselves the Poel Group because they were bent on attacking the principles that had been evaluated in *Poel*. More recently we have something which is called the Custody Mine Field, and the Custody Mine Field in December 2009 published a report on relocation. This is an effective pressure group operating through the internet, receiving hits from parents who feel themselves to be on the wrong end of a relocation dispute, and offering advice to them in return. That they are effective is indicated by the fact that they have persuaded a Member of Parliament to put down an early motion in the House of Commons bringing all this issue up into Parliament.

But I want to close with a little bit of light relief, and so I am going to draw your attention to the foreword to this report, which was written by the well known entertainer, Bob Geldof. He is one of many saints that the Irish have introduced to the wider world. So I am going to quote one or two passages from this choice polemic. This is what he has to say about the Family Court in England and Wales. "It is a disgraceful mess. A farrago of cod professionalism and faux concern largely predicated on nonsensical social guff, mumbo-jumbo and psycho-babble." But he then gives us his view on relocation. "How much longer must we put up with the state sanctioned kidnap of our most vulnerable? Because in effect that's what 'Leave to Remove' amounts to. How much longer do we tolerate the vested interest and intransigence of the appalling U.K. Family Justice system? How long before just one of them admit they have got it ALL wrong and apologise? [...] This Report [...] accepts the awful conclusion that rather than Solomon like resolving our tragically human disputes with understanding, compassion and logical pragmatism the courts have consistently acted against society's interest through the application of prejudice, gender bias and awful impartial cruelty. [...] May God forgive them. I won't." So there you are. We are not popular.

**The Honorable Mônica
Jacqueline SIFUENTES
PACHECO DE MEDEIROS***

**Chief Judge of the Federal Court
of Appeals, Brazil**

Thank you, Mr Chairman. Good morning to you all.



First of all, I would like to express my appreciation to those who have invited me to participate in this important Conference that involves a subject that is very close to my heart, the best interests of children. It is very interesting and useful to me as a Latin American Judge to hear all the presentations of my colleagues from abroad and to learn about their experiences. Most of all, dear colleagues, I am impressed by the enormous commitment that I see in all of you regarding international child protection.

Brazil does not yet have specific legislation dealing with relocation. Usually these cases fall within the competence of the State courts. But, as Dr Freeman said, there is a strong link between international child abduction and relocation. I wish to make a few remarks about it.

I am a Federal Judge in Brazil and almost four years ago I was designated by the Supreme Court of Brazil to act as a Liaison Judge in cases of child abduction. Since then I have been talking to judges responsible for trying cases involving the 1980 Hague Convention. I have seen how difficult it has been for the judge who hears the case simply to apply the Convention without any further questioning about the background of the case or how the situation of the child came about. Practice has shown that cases are more and more complex, making it increasingly difficult for the judge to take a decision about returning the child without knowing his or her background, or knowing what his or her future will be. I confess that in the past four years I have seen some hair-raising cases.

The fact is that, since its accession to the 1980 Hague Convention, Brazil has received a lot of criticism from the international community regarding its enforcement of Convention rules. The highest number of complaints, including from the Brazilian Central Authority itself, concern the delays in the judicial process. Actually there is a noted contradiction within the 1980 Hague Convention itself. While on the one hand it establishes a system that requires the immediate return of the children, on the other hand it establishes the need for the court to examine all the evidence to determine if the removal or retention was wrongful under Article 3. The judge also has to evaluate if there are exceptions under the Convention that prevent the return of the child as well. The judge has to decide these questions

obviously after hearing both parties. These factors contribute significantly to major delays in the court proceedings.

Furthermore, there is an important factor which has been responsible for the delay in the Brazilian cases: the absence in domestic law of a specific judicial procedure for 1980 Hague Convention cases that complies with the requirements of the Convention. I think that this is not only a problem for the Brazilian judicial system. Maybe others might have the same problem. Brazilian judges have felt the lack in our legal system of a faster judicial procedure to specifically assist the promptness encouraged by the Convention. The most common mechanism in cases used by Brazilian judges is the precautionary procedure called 'search and seizure'. However, this procedure is not commonly used in family law cases, but only in civil disputes involving goods and financial obligations. Although considered speedy, this procedure does not satisfy the peculiarities of the child abduction cases.

The good news is that at the end of last year a Bill was drawn up and will be sent to the Brazilian Congress about the procedure to be followed by judges in 1980 Hague Convention cases. The main point of this Bill is to provide guidelines that will facilitate and speed up the judicial process in cases that involve child abduction.

Another point is that the judges who I have spoken with say that they are concerned about the lack of guarantees that can be given by the requesting State considering the position of the child / abducting parent after a return. This does not seem to be very clear in the 1980 Hague Convention. In one recent case we had with Germany, undertakings were agreed upon in advance by the Brazilian judge hearing the case of the return and the German judge (who will decide in the future about custody). This was done without any problems using direct judicial communications. However, this was because both of the judges in the two countries were determined and willing to resolve the case in the best possible way. It was this desire to find the best resolution that in my view enabled the establishment of such undertakings. Today, as far as I am aware, the mother is in a shelter in Germany, awaiting the decision about the custody of her children. Nevertheless, when there is no interest or goodwill by the parties, what should we do? This is one of the points that demands more comprehensive regulation. I think mediation offers the best solution in the best interests of the children. That is all that I would like to say and thank you for your attention.

* Editor's note: this speech has been transcribed from the recording of proceedings and edited at the Permanent Bureau of the Hague Conference on Private International Law

RELOCATION IN AUSTRALIA: AN UPDATE

The Honourable Chief Justice
Diana BRYANT

Chief Justice of the Family Court
of Australia, Australia



Introduction

Part VII of the *Family Law Act 1975* (Cth), which is concerned with children's proceedings, was substantially amended by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). The amendments, which came into effect on 1 July 2006, imposed new obligations on judicial officers hearing and determining parenting disputes, including cases involving an application by a parent to move to a distant location with the child or children.

Arguably the most significant amendment, insofar as its effect on the outcome of relocation cases, is that contained in section 60CC(2)(a) of the Act. Section 60CC(2)(a) is one of two 'primary considerations' which the Court must take into account in deciding what arrangements would be in the best interests of the child. It states that, in determining what is in a child's best interests, the Court must have regard to the benefit to the child of having a "meaningful relationship" with both of the child's parents. This provision is consistent with one of the objects of Part VII, as amended, which is to ensure that children's best interests are met by their having the benefit of a meaningful relationship with both parents, to the maximum extent consistent with the children's best interests (section 60B(1)(a)).

Other new provisions include section 60CC(4), whereby the Court must consider the extent to which each parent has facilitated, or failed to facilitate, the other parent participating in long-term decisions about the child, spending time with the child and communicating with the child; and section 65DAA, which requires the Court to consider whether it would be in the best interests of the child to spend equal time, or substantial and significant time, with both parents, and the reasonable practicability of such arrangements (this requirement being triggered by the making of an order for equal shared parental responsibility).

There have been several important decisions handed down by the Full Court of the Family Court of Australia on relocation subsequent to the commencement of the shared parenting reforms, from which various principles can be distilled. On 3 March 2010, the High Court of Australia delivered its reasons for judgment in a relocation appeal heard by it on 3 December 2009, at which time the High Court took the unusual step of allowing the appeal at the conclusion of the hearing but otherwise reserving judgment. This decision provides authoritative direction on how 'reasonable

practicability' should be considered at trial when equal time or substantial and significant time are in issue.

Key issues emerging from the jurisprudence

What hasn't changed?

Although much has changed since 1 July 2006, it is important to keep in mind that certain fundamental legal precepts remain unaffected. In particular, the shared parenting amendments have in no way displaced the paramountcy principle: that the best interests of the child is the overriding factor that the Court must have regard to when making parenting orders (section 60CA), including orders in relocation cases. The legislature did not introduce a presumption either in favour of or against relocation and in Australia, a 'best interests' test – albeit one which is differently structured and which includes consideration of a multiplicity of factors – continues to apply. It is also clear that although relocation cases raise difficult and challenging issues, they are not a different 'species' of parenting dispute and thus the same legal principles that apply to the determination of children's cases generally apply equally to relocation cases. That, too, remains untouched by the 2006 amendments.

What approach should be used when considering relocation applications?

Undoubtedly, the process of deciding the outcome of a relocation case is more complex than it was prior to the shared parenting amendments coming into effect. Helpfully however, the Full Court of the Family Court of Australia has provided some guidance to trial judges on what approach to adopt when deciding a children's case involving a relocation application.

In the 2007 case of *Taylor & Barker* (2007) 37 Fam LR 461, the Full Court heard an appeal by the father of a young child against a decision of a federal magistrate which permitted the mother to move interstate with the child. The substance of the appeal concerned the approach that the federal magistrate had adopted in arriving at his decision. It was asserted on behalf of the father that the federal magistrate erred in treating the relocation proposal as a "separate and determinative issue." The Full Court confirmed that the preferred approach, where possible, is to treat a relocation proposal as one of the proposals for a child's future living arrangements and not as a "separate and discrete issue." During the hearing of the appeal, considerable attention was directed to the order in which the provisions of Part VII of the Act should be considered in a relocation case. The Full Court observed that the legislation is effectively silent on this issue. However, in light of the best interests of the child being the determinative issue, it seemed logical to the Full Court to first make findings as to the 'best interests' factors contained in section 60CC before attempting to apply any other provision in Part VII in which the child's best interests are determinative (for example, whether a child should spend equal time or substantial and significant time

with both parents). The Full Court added however that failing to follow that approach would not amount to appellable error unless inadequate reasons were given or relevant matters were not taken into account.

This approach was confirmed by differently constituted Full Courts in *Sealey & Archer* [2008] FamCAFC 142 and *McCall & Clark* (2009) 41 Fam LR 483.

Effectively, the preferred approach involves three steps.

- Make findings about the relevant section 60CC 'best interests' factors;
- Consider, based on the section 60CC findings, whether equal time or substantial and significant time is in the child's best interests; and
- Consider the "reasonable practicability" of such arrangements.

The Full Court, in the decisions of *McCall & Clark* (supra) and *Starr & Duggan* [2009] FamCAFC 115, acknowledged that this approach will often involve a "dual consideration" of some matters. This is because consideration of the 'best interests' factors in section 60CC factors does not take place in a vacuum and those factors will need to be assessed in the context of the competing proposals.

What is meant by the term 'meaningful relationship'?

One of the new legislative concepts that has garnered considerable interest is that of what the term 'meaningful relationship' actually means. Guidance on this question was provided by the Full Court of the Family Court in *McCall & Clark* (supra).

The decision is an important one, not least because it underscores the need for the Court's inquiry to be directed towards the *benefit to the child* of having a meaningful relationship with both parents, as section 60CC(2)(a) clearly states. The exercise is not one of ascertaining whether there is a meaningful relationship in existence and relying upon the existence or otherwise of such a relationship to determine whether a parent should be permitted to relocate or not. As the Full Court emphasised, the inquiry is a qualitative one, involving an articulation of the benefits accruing from relationships with both parents and an assessment of whether those benefits to the child can be maintained even if the interactions between the child and parents changed.

McCall & Clark involved an appeal to the Full Court against a federal magistrate's decision to permit a mother and four-year old child to relocate from Australia to Dubai, in circumstances in which the mother had already left the jurisdiction with the child against the wishes of the father. The critical issue on appeal was whether the federal magistrate had given any or sufficient weight to the benefit to the child of having a meaningful relationship with his father.

The Full Court rejected an interpretation of 'meaningful' that would have the consequence of elevating

that primary consideration to the status of a legal presumption that children benefit from having a meaningful relationship with both parents. The Full Court considered that if the legislature intended for the Court to apply a presumption it would have said so in clear and unambiguous terms. Instead, the Full Court held that the correct approach is for the Court to consider and weigh the evidence at the date of the hearing and determine how, if it is in a child's best interests, orders can be framed to ensure the particular child has a meaningful relationship with both parents. The Full Court described this as the 'prospective approach'.

The Full Court, in upholding the appeal, found that the federal magistrate had failed to weigh up and contrast the detriments to the child in remaining in Dubai compared with the benefits the child may experience by living in Australia and particularly the benefit of a significant relationship with his father. Significantly in the Full Court's view, the federal magistrate "did not consider whether the orders ultimately made would enable the child to develop a meaningful relationship with the father other than a brief reference that the father could develop a meaningful relationship with the child if he relocated to Dubai without any real consideration of practical difficulties inherent with such a proposal."

The Full Court's reasoning makes it clear that judicial officers have a positive obligation to fully consider whether there is a meaningful relationship between the child and both parents, the benefits to the child of that relationship, how those benefits would be attenuated by any move by the parent seeking to relocate and the orders which are necessary to ensure that the child is able to continue to enjoy the benefits of that relationship into the future.

How important is 'reasonable practicability'?

The issue of 'reasonable practicability' arises in parenting cases as a result of section 65DAA. It requires the Court to consider making an order that a child spend equal time, or substantial and significant time, with both parents if the Court intends making an order that parents have equal shared parental responsibility for the child. When considering whether to make an order for equal time or substantial and significant time, the Court must consider whether such an order would be 'reasonably practicable.' Section 65DAA(5) lists a series of factors that the Court must have regard to in deciding whether equal time or substantial and significant time is reasonably practicable, including the distance the parents live from each other, the parents' current and future capacity to implement such arrangements, and the impact the arrangement would have on the child.

In *Sampson & Harnett* (No 10) (2008) 38 Fam LR 315 the Full Court heard an appeal from a decision in which orders were made establishing the home of two young children in Sydney, New South Wales and where the

children were ordered to spend increasing amounts of time with the father, who lived in Sydney, until a shared care arrangement was in place. The mother, who until the trial lived in Victoria with the children, was not ordered to move with them as such but it was accepted by the trial judge and the Full Court that the orders would be unworkable if the mother did not relocate. The appeal raised issues as to the appropriateness of making orders with a coercive effect and whether the trial judge had adequately considered the “reasonable practicability” of the mother moving to and living in Sydney.

The Full Court conceded that although the case was a very difficult one and that the trial judge did not receive sufficient assistance from the parties with respect to all areas of the enquiry she was required to undertake, the effect of the orders ultimately made was such that an “unusually stringent enquiry” was necessary. The Full Court held that it would only be in circumstances of significant wealth of both parties that the Court could infer that the “practicalities of life” could be met if a party was ordered to relocate. In the circumstances of the case, the Full Court found that the trial judge had not given sufficient scrutiny to alternatives to the mother’s relocation to enable the relationship between the father and children to develop and did not have adequate regard to the practicality of the mother living in Sydney. The Full Court found that, because the trial judge’s orders were at the “extreme end” of the discretionary range, it was incumbent upon her to closely examine the mother’s circumstances, including the cost of a shared care arrangement with the mother living in Sydney, the mother’s capacity to work measured against her care of the children, the costs of child care, the availability of work for the mother and the capacity of the father to meet any need of the mother for support. The Full Court found that these matters had not been adequately explored and allowed the appeal, remitting the matter for re-hearing on a limited basis.

The High Court of Australia and ‘reasonable practicability’

The question of “reasonable practicability” is the fulcrum of the High Court’s decision in *MRR & GR* [2010] HCA 4, which involved an appeal from a decision of the Full Court of the Family Court.

The Full Court’s decision is reported as *Rosa & Rosa* [2009] FamCAFC 81. It involved an appeal from a decision of a federal magistrate, where the mother of a young child was refused permission to relocate from North West Queensland to Sydney, New South Wales. Orders were made for the child to spend equal time with both parents in North West Queensland. At trial, the federal magistrate found that the mother’s family had a negative attitude towards the father, which had the potential to affect the relationship between the father and the child. The federal magistrate expressed concern at the mother’s willingness to encourage the relationship

between the father and child if she were permitted to relocate. Part of the mother’s evidence concerned her purported physical and emotional isolation in North West Queensland, her limited employment prospects, her poor financial position and the necessity for her to live in ‘caravan-style’ accommodation.

The Full Court held that although the federal magistrate had only referred to these matters briefly, at the conclusion of his judgment, given his great concerns about the attitude of the mother and her family to the relationship between the father and the child, it was unlikely that any greater weight given to those matters would outweigh his concerns about the need to preserve the child’s relationship with the father.

On the specific issue of the federal magistrate’s consideration of reasonable practicability in the context of his making an order for a week-about arrangement, it was asserted by counsel for the mother that the federal magistrate had failed to address matters including the parties’ poor communication, the parties’ different approaches to parenting and the father’s attitude towards the mother’s parenting capacity. The Full Court conceded that the federal magistrate had not expressly considered the issue of ‘reasonable practicability’ but rejected these grounds of appeal on the basis that the federal magistrate had addressed the identified matters in his consideration of the section 60CC ‘best interests’ factors. The appeal was refused and the mother was subsequently granted special leave to appeal to the High Court of Australia. The High Court made orders on 3 December 2009 allowing the appeal and remitting the matter for re-hearing. Judgment was delivered on 3 March 2010.

The judgment, which is the first relocation decision delivered by the High Court of Australia since 2002, is brief. The five members of the bench unanimously held that section 65DAA(1) is expressed in imperative terms. The High Court said:

A determination as a question of fact that it is reasonably practicable that equal time be spent with each parent is a statutory condition which must be fulfilled before the Court has power to make a parenting order of that kind. It is a matter upon which power is conditioned much as it is where a jurisdictional fact must be proved to exist. [para 13]

The High Court distinguished the question of ‘best interests’ from that of ‘reasonable practicability’ on the basis that a ‘best interests’ inquiry is directed to the desirability of the arrangement, whereas reasonable practicability is concerned with the reality of the situation. In the High Court’s view, had the federal magistrate undertaken a practical assessment of the circumstances of the parties, he could only have concluded that an equal time arrangement was not reasonably practicable.

What does the future hold?

Australian jurisprudence in this notoriously fraught area of the law will continue to develop. A review of Part VII of the *Family Law Act 1975* (Cth) is also not out of the question.

The Commonwealth Attorney-General currently has in his possession three reports arising from various reviews of the operation of the 2006 shared parenting reforms. Admittedly, two of these are specifically concerned with family violence but the recommendations arising from all three reports have more general application, including recommendations for legislative amendment to Part VII. At time of writing, the Attorney-General has not announced its response to any of the three reports. There is however considerable speculation in the media and elsewhere that certain features of the shared parenting laws, such as the obligation on the Court to consider equal time, will be ameliorated.

THE JUDICIAL APPROACH TO RELOCATION IN CANADA²⁸

**The Honourable
Jacques CHAMBERLAND**

**Quebec Court of Appeal,
Canada**



Introduction

Relocation cases are notoriously difficult for judges and lawyers.

According to Patrick Parkinson and Judy Cashmore,²⁹ they "(...) are the San Andreas Fault of family law. They reflect the tension between the freedom of people as adults to leave a relationship and begin a new life for themselves, and the harsh reality that while marriages (and other relationships) may be dissoluble, parenthood is not. Children usually benefit from a close and continuing relationship with a non-resident parent in the absence of abuse, violence or very high conflict. Maintaining that connection if one parent moves a long way from the other is difficult, to say the least."

Canada is an increasingly mobile society and, after a separation or a divorce, former spouses are likely to move to different locations.

Cases in which one parent seeks to relocate with the children pose great challenges for judges, as well for the parents and children involved.

²⁸These notes, prepared for The International Judicial Conference on Cross-Border Family Relocation, were adapted from a forthcoming paper to be published in *International Family Law* 2010.

²⁹Patrick Parkinson and Judy Cashmore, *The Need for Reality Testing in Relocation Disputes: Empirical Evidence from Australia*, a paper for Cumberland Lodge Conference, August 2009, at 2.

These cases tend to be more bitterly contested than other family law cases, as there may be no middle ground for a compromise.

The purpose of this presentation is to give an overview of the judicial approach to relocation in Canada.

The Canadian Law of Parental Relocation

There is no definition of relocation in Canadian law, which gives rise to a certain amount of confusion and ambiguity when approaching this question. This is in contrast with certain jurisdictions that use distance or the crossing of borders as a trigger for the operation of their relocation laws (for instance, the State of Louisiana defines a relocation case as one where the move is either out of the State or farther than 150 miles (241.5 km) from the residence of the parent staying behind (*La. Rev. Stat. Ann.* § 9 :355.1); in the State of Florida, for a "relocation" situation to exist, the change of location must be at least 50 miles from that residence, and for at least 60 consecutive days not including a temporary absence from the principal residence for purposes of vacation, education, or the provision of health care for the child (Florida Statutes, Section 61.13001, Parental Relocation with a Child, into effect since October 1, 2009)).

In a country as vast as Canada, relocation issues are not limited to situations involving a move to another country; they also arise when a parent asks for the exclusive custody of a child in order to move to another location within Canada, or even, depending on the circumstances, to another location within the same province or territory.

The Canadian law of parental relocation was definitively set by the Supreme Court of Canada in 1996, in the case of *Gordon v. Goertz*.³⁰

Canadian judges must follow a "best interests of the child" approach that requires an individualized assessment of each case, without any presumption in favour of either parent or onus on any of them.

³⁰[1996] 2 S.C.R. 27 (2 May 1996). In this case, the parties resided in Saskatoon, in the Province of Saskatchewan, until their separation. The mother petitioned for divorce under the *Divorce Act* and was granted permanent custody of the young child while the father received generous access. When the father learned that the mother intended to move to Australia to study orthodontics, he applied for custody of the child, or alternatively, for an order restraining the mother from moving the child from Saskatoon. The trial judge found that the mother was the proper person to have custody of the child and allowed her to move to Australia with the child, while granting the father liberal and generous access on one month's notice to be exercised in Australia only. The Court of Appeal for Saskatchewan upheld the order. The issue before the Supreme Court of Canada was whether the trial judge and the Court of Appeal had erred in permitting the child to move to Australia with the mother, the custodial parent. The mother having already moved to Australia with her daughter when the case came before the Supreme Court of Canada, the Court was faced with a *fait accompli* and thus forced to conduct a *post facto* analysis. The majority reasons are those of McLachlin J. (now Chief Justice McLachlin).

However, the custodial parent's views are entitled to great respect and the most serious consideration.³¹

Courts are directed to undertake "a fresh inquiry" in the case,³² each case turning on its own unique circumstances.

The inquiry is carried on having regard to all relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

The Court provides a list of factors (or guidelines) that should be considered, including the existing custody arrangement and relationship between the child and the custodial parent, the existing access arrangement and the relationship between the child and the access parent, the desirability of re-examining contact between the child and both parents, the views of the child, the disruption to the child of a change in custody, the disruption to the child consequent on removal from family, schools and the community he or she has come to know.³³

The Court states that the custodial parent's reason for moving must not be considered except in the exceptional case where it is relevant to that parent's ability to meet the needs of the child.³⁴

The Court rules that, in the end, the ultimate question for judges to consider is: what is in the best interests of the child in all the circumstances, old as well as new?³⁵

This analytical framework continues to be the law governing parental relocation issues in Canada, whether the matter comes under the federal *Divorce Act* (as in *Gordon v. Goertz*) or under provincial legislation. It applies equally to an initial custody application involving a question of mobility, as well as to an application to vary a final custody order. It applies also to the relocation of children of common law partnerships (in French, "unions de fait").

In the almost 15 years since the *Gordon v. Goetz* decision, the Supreme Court of Canada has denied leave to appeal in all relocation cases that have come before it.

For some the approach proposed by the Supreme Court is a sensible one. It "(...) has the advantage of allowing

³¹"The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability." *Ibid.* at para. 48.

³²*Ibid.* at para. 47.

³³*Ibid.* at para. 49.

³⁴*Ibid.* at para. 48-49; the Court reasons that since "the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration... barring an improper motive reflecting adversely on the custodial parent's parenting ability", the reasons for the move should not be assessed by the Court.

³⁵*Ibid.* at para. 50.

a focus on the welfare of the individual child before the court, and is neutral in relation to the "rights" of fathers as opposed to mothers and the claims of gendered advocacy groups".³⁶

For others the guidance provided by the Supreme Court of Canada for resolving parental relocation issues is unclear and, because of that, the outcome in individual cases is unpredictable and uncertain. According to Professor Thompson, the Canadian law of relocation is a "mess",³⁷ amounting to a "ruleless world"³⁸ in which prediction of judicial outcomes is difficult and, hence, settlements more difficult to achieve. This is how he concludes his 2004 paper on parental relocation:

That's where we're left in Canada – a world of mobility without presumptions, without burdens, with a "fresh inquiry" into custody with each proposed move, with litigation and relitigation, and with the lack of consistency or predictability that comes with a pure "best interests" test. (...)

One of the most unfortunate effects of Gordon v. Goertz has been its demolition of any law at all in this field, to the point that trial and appeal judges are unprepared to develop any working principles or generalizations of any kind. Facts are stated and conclusions reached, with the most modest explanation possible within the limits of Gordon. In Canada, there is little "law" of relocation left. We're not movin' on, we're just stuck in the same old place.

The difficulty to predict the outcome of a relocation case is present not only at the trial level but also in appeal, despite the "deference standard" applicable to the review of the decisions rendered by trial courts in family law cases.³⁹

But this situation is not unique to Canada.

The sad reality of relocation cases is that while the test to be applied is intended to promote the best interests of the children involved, judges are forced to choose between a small number of alternatives, each of which will result in the child being less well off in some significant respect.

³⁶Nicholas Bala and Joanna Harris, *Parental Relocation: Applying the Best Interests of the Child Test in Ontario*, (2006) 22 Can. J. Fam. L. 127-170 at 4.

³⁷Thompson, Rollie D.A., *Ten Years After Gordon: No Law, Nowhere*, (2007) 35 Reports of Family Law (6th), 307, at 307.

³⁸Thompson, Rollie D.A., *Movin' On: Parental Relocation in Canada*, (2004) 42:3 Family Court Review, 398, at 404.

³⁹*Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014. In family law cases an appeal court should only reverse a trial decision if satisfied that the trial judge made a "material error", specifically that the judge misapprehended the evidence, erred in law, or reached a conclusion that was so perverse on the evidence and law as to exceed the generous ambit within which reasonable disagreement is possible. The importance of finality in custody cases and the fact-specific nature of each case command such a "deference standard".

If the custodial parent is permitted to move with the child, this will inevitably strain, and sometimes effectively sever, the child's relationship with the access parent. If, on the other hand, the custodial parent is to move without the child, should his or her request for the court's approval be denied, the change in the child's living arrangements will be emotionally disruptive to the child, and the relationship with the parent who moves away will suffer.

In *Gordon v. Goertz*, McLachlin J. writes that "In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community".⁴⁰

This is, and will always be, a difficult balancing exercise, no matter what. Should I dare borrow the words of Lord Justice Thorpe, I would say that "often the balance is very fine between grant and refusal".⁴¹

However, there is hope.

Despite the fact-driven nature of relocation cases, certain factors appear to be more important than others and certain patterns appear to be emerging in the Canadian case law.⁴² For example,

- the comparative importance of the child's relationship with the two parents
 - the relationship of the child and the new partner of the parent who plans to move
 - the reason for the move, necessity or benefit to the move
 - the behaviour of the parent who wants to move
- a) the comparative importance of the child's relationship with each of the two parents

The mere fact that the parent who wants to move is characterized as the "primary caregiver"⁴³ does not

⁴⁰ *Supra*, note 30, at para. 50.

⁴¹ Thorpe L. J., "Relocation – The Search for Common Principles: The Problem", 4th World Congress on Family Law and Children's Rights, Cape Town, South Africa, 2-3 March 2005.

⁴² *Supra*, note 36.

⁴³ In *Burns v. Burns* (2000), 183 D.L.R. (4th) 66, 79 (N.S.C.A.), Roscoe J.A. explains the term, where the two children spend three nights a week with the father:

However, the actual period of time spent with the children is not the only determinant. More importantly, in my opinion, is which parent has taken responsibility for all the important decisions concerning the health, safety, education, and overall welfare of the children, since the parties separated four years ago... In addition to the major matters, the primary caregiver is the parent who deals with the countless less significant, but nonetheless obligatory, daily arrangements for children's clothing, haircuts, hygiene, extracurricular activities and everyday mundane affairs. Who would buy a present for them to take to a school friend's birthday party? Who makes the appointments and takes them to the dentist? Which parent is keeping the record of their vaccinations, and fills their prescriptions? Who goes to the parent-teacher interviews? Who chose the pre-school?

mean that the court will automatically allow the move; however, if the child has only limited involvement with the "access parent", the court is much more likely to allow the child to move. Conversely, if both parents have close relationships with the child and are in a true shared parenting situation, the court will be more reluctant to permit a move to occur.

To this extent, the legal form of a custody order makes no difference in relocation cases, whether the "custodial parent" has "sole custody" or "principal residence" or "primary care under a joint legal custody order". But real "shared custody" makes a difference.⁴⁴

According to Professor Thompson, if the parents share custody in a meaningful manner (say, each having the child for more than 40% of the time), the courts say no to the intended move in 60-70% of the cases.⁴⁵ Professor Thompson refers to a "reverse onus" in these cases, compared to the cases where the situation allows the clear identification of a "primary caregiver parent".

- b) the relationship of the child with the new partner of the parent who plans to move

Judges are especially concerned about this relationship as the child is likely to be spending considerable time with that person if the relocation is approved.

If the new partner has not spent much time with the child or if there are concerns about his or her character, the court is less likely to allow the move.

Conversely, where the child has a good relationship with the new partner, this is likely a factor in allowing the move.

- c) the reason for the move

Despite McLachlin J.'s general statement in *Gordon v. Goertz* not to consider the custodial parent's reason to move – but for the exceptional case where it is relevant to that parent's ability to meet the needs of the child⁴⁶ – judges in both trial and appellate courts do consider the reasons for the move, as these will often have an impact on the welfare of the child.

When there are strong economic reasons for a move, this will be a good reason to allow the relocation. When the social and psychological well-being of the custodial parent and the child is dependent upon the move, this will also be a good reason to allow the relocation.⁴⁷ Conversely, when the custodial parent has significant ties to the community

⁴⁴ *Young v. Young*, (2003) 34 R.F.L. (5th) 214 (Ont. C.A.); *Hanna v. Hanna*, 2002 BCCA 702, [2002] B.C.J. No. 2980.

⁴⁵ Thompson, Rollie D.A., *Movin' On: Parental Relocation in Canada*, *supra*, note 38, at 405.

⁴⁶ See note 34. A position which Professor Thompson characterizes as being "odd and impractical", *Movin' On: Parental Relocation in Canada*, *supra*, note 38, at 406.

⁴⁷ *Bjornson v. Creighton* (2002), 62 O.R. (3d) 236, [2002] O.J. No. 4634 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused, [2003] S.C.C.A. 14; at para. 28, "In this case, the child's best interests are best served and better achieved by a well-functioning and happy custodial parent, operating at her full potential" (Austin J.A.).

where she and the children reside, and she does not have strong social or economic reasons for moving, the court is likely not to be sympathetic to relocation.

In short, what really seems to matter is not the category of the reasons for the move⁴⁸ but the demonstration of necessity or benefit to the move.⁴⁹

d) the behaviour of the parent who wants to move

The conduct of the custodial parent usually results in the courts not permitting the relocation with the child.

The conduct can take different forms: taking the child to a new location without informing the other parent and often, without planning, dishonesty towards the other parent (and sometimes towards the child), being misleading or dishonest with the courts about future plans or circumstances, etc.⁵⁰

The stated reason for refusing to allow the move in case of bad conduct is not a desire to punish the badly behaved parent, but rather a concern that a custodial parent who engages in this type of conduct demonstrates a lack of commitment to the welfare of the child, and would be unreliable in carrying out commitments to support a relationship between the child and the distant parent after a move.

Conversely, if the court is satisfied that the parent who wants to relocate is cooperative and likely to support the relationship of the child with the other parent after the move, the court is more likely to allow the relocation.

According to McLeod and Mamo:⁵¹

The weight of judicial authority since Gordon v. Goertz supports a court allowing a move that is proposed in good faith and not intended to frustrate an access parent's relationship with a child, so long as the primary caregiver parent is prepared to accommodate the interests of the child and the access parent by restructuring access and perhaps by reducing child support to acknowledge the increased costs of access [...].

Finally, before concluding, I should say a word about a question custodial parents often have to face in

⁴⁸Be it the move back to family, the move for job or training, the move for job and family, the move for job of new husband or boyfriend, the move to husband-to-be or boyfriend, etc.

⁴⁹In *K.J. v. N.P.*, 2006 QCCA 1054, [2006] R.J.Q. 2023, the Quebec Court of Appeal confirmed the trial judge's decision not to allow the mother to move to Germany with the child in order to pursue doctoral studies; the relocation project was said to be hastily planned and to jeopardize the child's relationship with the father. Morissette J.A. writes, at para. 37, that "care must be taken not to conflate [the mother's] current perception of her academic or professional interests with a detached appreciation of her son's best interests".

⁵⁰*Droit de la famille* – 07567, 2007 QCCA 398, 500-09-016745-069, 14 March 2007, Robert, C.J., Beauregard, Chamberland, J.J.A.; *Droit de la famille* – 071207, 2007 QCCA 710, 200-09-005792-061, 18 May 2007, Rochette, Rayle, Bich, J.J.A.

⁵¹James G. McLeod and Alfred A. Mamo, *Annual Review of Family Law 2008*, Toronto, Thomson Carswell, 2008, p. 103.

a relocation case: what will they do should their application to relocate with the children be denied? Will they still go ahead with their plans and move to another location, without the children, or, on the contrary, will they abandon their plans and stay where they are?

In *Spencer v. Spencer*⁵², the Alberta Court of Appeal expressed concern about the "double bind" faced by the custodial parent confronted with this kind of question.

Here is how Payne and Payne comment on the issue:⁵³

If a custodial mother, in response to an inquiry, states that she is unwilling to remain behind with the children, her answer raises the prospect of her being regarded as selfish in placing her own interests ahead of the best interests of the children. If, on the other hand, she is willing to forgo the relocation, her willingness to stay behind "for the sake of the children" renders the status quo an attractive option for the presiding judge to favour because it avoids the difficult decision that the application otherwise presents.

In *P.S. v. S.B.*,⁵⁴ the Quebec Court of Appeal concludes that, as a general rule, such questions are irrelevant to the issue of whether or not it is in the best interests of the child to relocate. In addition, such an inquiry is perceived to be unfair to the parent who applies to the courts for leave to relocate.

Conclusion

Since the 1996 Supreme Court of Canada decision in *Gordon v. Goertz*, Canadian judges follow a "best interests of the child" approach that requires an individualized assessment in each case, without any presumption or onus.

There continue to be suggestions put forward by scholars⁵⁵ for the reform of the laws governing parental relocation. It appears unlikely, however, that in the foreseeable future Canada will move away from the "best interests of the child" approach.⁵⁶

The present approach to parental relocation is extremely flexible. It has the advantage of allowing for individualized determinations, but also, given its discretionary nature and the fact-driven nature of the analysis, the disadvantage of tending to promote uncertainty and litigation.

⁵²(2005), 371 A.R. 78 (Alta C.A.).

⁵³Julien D. Payne and Marilyn A. Payne, *Canadian Family Law*, 3d ed., Toronto, Irwin Law, p. 488-489; see also, on this point, Carol S. Bruch and Janet M. Bowermaster, "The Relocation of Children and Custodial Parents: Public Policy, Past and Present", (1996) 30 Fam. L. Q. 245, 260-261; and *Droit de la famille* – 091332, 2009 QCCA 1068, 200-09-006463-084, 28 May 2009, Thibault, Giroux, Côté, J.J.A. [2007] R.D.F. 665 (C.A.); the same principle was reiterated recently in *L.P. c. P.R.*, 2009 QCCA 1068 (May 28, 2009).

⁵⁴Martha Bailey & Michelle Giroux, *Relocation of Custodial Parents – Final Report*, Ottawa: Status of Women Canada, 1998.

⁵⁵See Nicholas Bala and Joanna Harris, *Parental Relocation: Applying the Best Interests of the Child Test in Ontario*, *supra*, note 36 at 87.

Justice Adel Omar SHERIF*

Deputy Chief Justice, Egypt

Thank you very much. I am certainly delighted to be here today. And I would like to start by congratulating the conveners of this Conference. I am thankful to all of them.



As you will see from the title of my presentation today, I will be talking about Egypt: a non-Hague country, an Islamic country and a country that belongs to the civil law tradition. I am planning to explore whether there is a convergence or divergence with the Western perception when it comes to the issue of child relocation. I have structured my presentation to give answers to a few important questions in this area. So I will start by trying to find out:

- Is there a problem with Muslim jurisdictions and is there a problem with Egypt?
- Where does Egypt stand regarding its international obligations within the framework of the protection of children internationally?
- What is the legislative framework regulating family law, including relocation issues, in Egypt?
- Who are the children concerned?
- How are judicial proceedings initiated in courts of law if you have to go through them?
- What is the role the separated parents have to play?
- How are jurisdiction and repatriation disputes determined?
- Are foreign judicial orders concerning relocation issues enforced in Egypt?
- What rules of Islam do Shariah Courts apply in relocation cases in Egypt?

I will also shed some light on the recent case law in this particular area in Egypt. Finally, I will conclude with a few remarks.

I will start with child relocation disputes. These have continued to grow throughout the world presenting a phenomenal problem in recent years. And the topic is increasingly attractive to scholars and researchers in different legal cultures of the world including Islamic countries. It touches upon and relates to a number of basic human rights and freedoms. In Muslim jurisdictions the facts of these disputes are almost identical to those taking place elsewhere. Legal custody of a child of disputing parents is granted following court proceedings. Then one of the separated parents attempts to alter the usual place of residence of the child and hence affects the ability of the other parent to have direct contact with that child. In practice most relocation cases are usually initiated by the custodial parent, often the mother. However, there are incidents

where the non-custodial parent is the one who sets off the procedures. In such cases one might ask, what principles should apply? What legal norms should be followed when trying to solve the individual cases at hand?

Now, what is wrong with Islamic countries in terms of Shariah relocation? In most Muslim jurisdictions child relocation disputes should be looked at within the general rules of Shariah, a situation that is often difficult for Westerners to understand. In modern times the word Islam reflects difference. For those who are true believers of Islam it has a positive connotation, while in Western society, especially after 9-11-2001, it generally has a scary, problematic connotation. In fact, Shariah by its very nature and history is an extremely complex and difficult subject. Indeed, although Shariah is commonly referred to for the sake of simplicity as Islamic law, even by Muslims, it is not only just law or a legal system. The term is generally understood to mean a code based on religious principles, principles that are meant to regulate the conduct of all Muslims in all aspects of life, including social, commercial, domestic, criminal and political efforts as well as devotional practices. For those who are familiar with child relocation disputes at an international level, especially those that fall within the 1980 Hague Child Abduction Convention, the current state of law in child relocation in Islamic countries seems to be somewhat problematic and even vague.

In Egypt, although there are no official records or texts available to us, it is believed that the number of relocation cases is increasing, as is the rate of divorce and separation in this mobile society.

Islamic Shariah rules are always applied in custody and relocation disputes concerning Muslim children. Prevailing rules of other religious minorities may also be invoked whenever the case pertains to a non-Muslim child. What counts when determining the child's religion is his father's religion. The fact that Egypt is not a Party to the 1980 Hague Child Abduction Convention in no way means that Egypt does not value the rights of children and has not taken steps to protect them. Rather, Egypt has continuously proclaimed its commitment to protect children and family rights and this is reflected in a number of Egyptian Statutes, many of which were adopted to give effect to the country's international obligations. Furthermore, like some other non-State Parties to the 1980 Hague Child Abduction Convention, Egypt has concluded bilateral arrangements with other States to regulate some of the legal and political aspects of child abduction disputes, including relocation cases.

On a broader scale, multilateral efforts are being made to breach the conceptual gaps between Parties to the 1980 Hague Child Abduction Convention and Islamic States. Given its leading role in the region, Egypt hopes that its bilateral efforts with other countries can further these endeavours. In addition, it has to be noted that Egypt's law is clear and sometimes tough when facing

* Editor's note: this speech has been transcribed from the recording of proceedings and edited at the Permanent Bureau of the Hague Conference on Private International Law

this problem. At the penal level the relocation of the child against a court order or without mutual consent of the custodial and non-custodial parent is a serious criminal offence under Egyptian law and criminal punishment will be imposed on the perpetrator whether a custodial parent or non-custodial parent, grandparent or any other person commits this crime.

As to the legislative framework, Egyptian law does not really provide for an explicit definition of relocation. Major pieces of legislation regulating family law issues are always observed when hearing any relocation disputes.

But which children are we concerned with in these cases? Well, in accordance with the provisions regulating child custody in Egypt, the age at which the mother's custody of her children would cease and be transferred to the father used to differ between Muslims and non-Muslims. However, the Supreme Constitutional Court of Egypt considered this to be discriminatory treatment among members of the same nation and, as such, prohibited by the Constitution. The Court decided that the age should be unified for all Egyptians regardless of their religion. In Egypt at the moment, custody is 15 years for both males and females and may be extended by a court order when this age is reached. The Judge will then give the child the option of remaining with his/her custodial mother without charging the father any maintenance until the boy reaches the majority age of 21 or the girl gets married. Thus, fathers now have a very limited ability to have custody of their children.

Mediation as a form of dispute resolution is still an option which parents can pursue instead of going to court in Egypt. If separated parents cannot reach an agreement the dispute becomes complicated and courts of law are invited to decide on the issue of relocation. Whatever decision the court reaches, it will have a serious and long-lasting impact on the rights of parents and children involved.

As to which courts hear relocation matters, although child relocation disputes together with the family law disputes in Egypt are substantively governed by religious rules, there are no religious courts as such. The jurisdiction here is vested in a special sub-branch within the civil courts known as the Family Court System. Family Courts hear all disputes concerning custody, access, visitation rights and relocation. As a general rule, their decisions are subject to appeal to a higher court. Interlocutory injunctions and temporary orders concerning relocation disputes can be made by the competent Family Court, as well as by the Family Public Prosecution office after observing certain formalities. As in other legal traditions the courts must carefully scrutinize the relocation application and its potential impact on the child and on its welfare. It will also look at the issue of future contact with the other parent, taking into account the applicant parent's motivation

for the move, including the emotional and psychological dimensions. The court should also strike a fair balance between the competing interests of the two separated parents and not help either of them to exclude the other from the child's life and bring the contact between the child and the other parent to an end. The court is likely to take into consideration each parent's reasons for seeking or opposing the move, the quality of the relationship between the child and the custodial and non-custodial parent, the degree to which the child's future life may be enhanced by the move and the ability to maintain fair contact and visitation arrangements for the concerned parent.

As to the enforcement of foreign judicial orders concerning relocation matters, actually foreign judicial orders concerning relocation matters are not generally automatically recognised in Egypt. The enforcement of such orders is subject to the general rules governing enforcement of foreign judicial decisions under Egyptian law, which require that a parent can request that a foreign judicial order will be recognised in Egypt, but the order will only be enforced if it does not contravene Egyptian law and Islamic Shariah principles, especially those relating to child custody. The parent must also seek legal representation in Egypt and file for custody in an Egyptian court.

The Islamic Shariah rules pertaining to family law applied in Egypt favour the mother and presumptively consider her to be the appropriate custodian of the child, unless the evidence establishes otherwise. There is therefore a general presumption that a child will be better off with his/her mother. The major objective of this rule in Islamic Shariah is the protection of the young child's interests, which normally and logically requires him or her to be in the hands of his or her mother. Therefore the court may grant custody and approve relocation of Muslim children to their non-Muslim mothers. But, in order for the court to do so, the mother should be a believer of one of the other two divine religions, Christianity or Judaism. In addition, the court must find the mother to be fit to undertake custody. This requires the mother to raise her child as a Muslim residing in an Islamic country. Courts may also grant custody to a foreign mother residing in Egypt, but such measures will not allow the mother any right to remove the child outside the country without the clear permission of the father or the approval of the court. Therefore the best interests of the child and his welfare are always given primary consideration by the court and even awarded higher weight than some basic constitutional rights, such as immigration, movement and travel rights.

A few examples of principles which are taken from Egyptian case law, which I have gone through recently:

1. A child should reside with the custodial mother at what used to be the family home before parental separation.

2. It is acceptable that the custodial parent resides with the child at a location which is not necessarily close to the non-custodial father's residence.
3. The non-custodial father cannot move the child from the city where he resides with his custodial mother without her consent.
4. The custody rights of the custodial mother or her child do not end if she moves with him or her to another city.
5. The custody rights of the mother will come to an end if she moves the child to a place other than the one she has been ordered by a court to take as the custodial residence.
6. The custodial mother is permitted to temporarily relocate with the child out of the country if her work duties require her to temporarily reside overseas.

To conclude, often the terminology we use in Muslim countries, including in Egypt, is not really comparable to what is used in common law States or Hague Convention countries. Sometimes we therefore feel that we are going down different paths, when substantively we are doing the same thing: we are trying to uphold the best interests of our children. A way has to be found to solve the problem of child relocation cases. A venue such as this one presents an opportunity for all of us from the international judicial community, from different legal traditions, to get together to try to find out what rules should be followed in order for us and our different jurisdictions to solve this problem. We should really learn from each others' experiences and try to come to an understanding as to how we would deal with the same problem in different jurisdictions. It is all about networking and creating mutual and common understanding. Also, we have to learn how to respect each other and create mutual respect. I believe this meeting will help us do so. There are many common elements in our legal systems and in that sense I believe we have to invest more than we have done as an international judicial community in judicial education so that we can promote an understanding among judicial communities from different parts of the world about international law.

In this specific area, child abduction and child relocation, experience has proven that a uniform system has to be established and, as many of you have stated in your papers, time is very much of the essence. It is time to look favourably into whether we can have an international instrument to regulate how this problem should be dealt with worldwide. I believe a lot of work has been done, but a lot of work still needs to be done in future and I am, and I believe you all are, very committed to this work. I am very hopeful that, with the help of our hosts here today, the U.S. State Department, the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children, we can reach such an international agreement in the near future.

The Honourable Judge Francisco Javier Forcada MIRANDA*

**Court of First Instance,
Saragossa, Spain**



At the moment, cross-border family relocation is a major problem in Spain, as a country that, for many years, has got enmeshed in a turbulent movement of its population. The unceasing migratory ebb and flow brings out the question as to whether the relocation of children can be allowed and under what conditions, this being the main focus and purpose of this conference. On top of that, within Spanish domestic law, the dividing line between custody, access, parental responsibility and *patria potestas* remains unclear for many citizens and stakeholders. Regarding this question, the successful General Principles and Guide to Good Practice published by the Hague Conference on Private International Law, in the field of Transfrontier Contact Concerning Children, discusses in its outline the meaning of rights of contact and access; that the partial definition of Art. 5 Hague Convention 25.10.1980 *has given rise to several problems of definition and divisions of opinion in the case law among and within Contracting States. The first concerns the precise dividing line between rights of custody and rights of access. The second problem is whether rights of custody include rights of access. The third issue is whether, for the purposes of Article 21 of the 1980 Convention, rights of access are limited to those which have been recognised or established by a court order, or whether they extend to rights arising by operation of law. Within national law systems the dividing line between custody and access is sometimes indistinct. In some systems which retain the language of "custody" and "access" the access parent may in fact retain important responsibilities of decision making concerning the child which go beyond a mere right of access. This may, for example, be the case in systems where the access parent remains a joint "guardian" of the child or the holder of patria potestas.*

In Spain, especially during a break-up of the family unit, there is a popular, but wrongful, belief (and this is a very well-known fact at all levels of the society) that a parent granted rights of custody acquires a power over the children (in many cases with legal support regarding which parent is granted the right to live in the family residence, Art 96 Spanish Civil Code), which overshadows the decision-making power of the contact parent, the holder of rights of access. The apparent decision-making power of the custody parent over all aspects of the children's lives eclipses the parent who only has rights of access, and this relegates her or him to a second or third division, even though *patria potestas* remains in the hands of both parents and is, purportedly

* Editor's note: this speech has been transcribed from the recording of proceedings and edited at the Permanent Bureau of the Hague Conference on Private International Law

and ostensibly, exercised jointly. *Patria potestas* (almost always remaining with both parents regardless of whether they are the custodial parent or contact parent) is made up of a lot of rights and duties, whose basic core legal framework can be discovered through Art. 39 Spanish Constitution and Art. 154 to 156 Civil Code. We have had a recent legal change due to a 2005 reform regarding marriage, separation and divorce, operated essentially by Act 15/2005 July 8th, which amends the Civil Code and the Civil Procedure Rules relating to separation and divorce, and by Act 13/2005 July 1st, by amending the Civil Code concerning the right to marry for same-sex couples, with very little influence in this matter, but revealing a certain preference or stance in favor of the joint exercise of *patria potestas* more than as a general rule. Arising from this, it is funny to observe that in real life, at street level, a lot of doctors, teachers, civil servants, public institutions, etc., seem to take on this false belief giving full voting rights only to the parent exercising rights of custody in all matters affecting children in a way which means that the parent exercising rights of access seems to have no standing in these matters. The problem is at its worst in situations relating to the removal of a child, in many cases to a far-off country.

In my view, this popular perception of things is not only a mistake but a terrible injustice, even more so when, from time to time, some domestic family courts, influenced by current social perceptions, provide in some way mistaken support to the custodial parent. To make it clear, there is no doubt that in Spain the custodial parent exercising *patria potestas* jointly cannot relocate the children, within or outside the country, without the permission of the contact parent exercising *patria potestas*. In fact, a contact parent is exercising rights of custody during the period in which the children are living with him or her. When *patria potestas* remains in both parents and there is a dispute between the custodial and contact parent about the relocation of a child, only a judge can allow the relocation (Art. 156 Spanish Civil Code, Art. 68 Aragon Act 13/2006, December 27, and Art. 139.4 Catalanian Act 9/1998, July, the 15th, Family Catalanian Code). This is the only legal way to proceed taking into account that a lot of conditions must be attached in such relocation cases, e.g. conditions relating to the preservation of future rights of access, communications, child support, etc. By way of example, the consent of both parents is required, as a general rule, to make decisions relating to relocation of the children both inside and outside the country, school changes, medical issues, unusual expenses, receiving information from teachers and doctors, etc. In Spain, beyond a mere right of access or a mere right of custody, both parents retain important decision making responsibilities concerning children, for example whether or not to allow the relocation of children.

For that reason, in a country where both parents are holders of *patria potestas*, the definition of rights of

custody and rights of access in international conventions such as in Art. 5 of the Hague Convention 25.10.1980 has created a certain confusion and some unfair situations as a consequence, at least for the present moment in which a new and recent current of opinion consider that these concepts should be interpreted according to the autonomous nature of the 1980 Hague Convention and in the light of its objectives. Relocation for sentimental or economic reasons, relocation and child abduction, how to prevent this kind of situation and to solve problems in order to evaluate the real interests of children in these kinds of situations are issues of a paramount significance nowadays. According to Art. 24(3) of the Charter of Fundamental Rights of the European Union, every child shall have the right to maintain on a regular basis a personal relationship and direct contact with either of his or her parents, unless that is contrary to his or her interests. It is well-known that this fundamental right will be affected in all cases of relocation in which a balanced and reasonable assessment of all interests involved must be done and based on proportional considerations.

In the European Union, the implementation since March 2005 of Council Regulation Brussels II *bis* has given rise to an interesting case-law of the European Court of Justice. We have on the table six judgments affecting this Regulation and a pending reference for a preliminary ruling lodged by Germany. Regarding relocation and international child abduction issues, several of these rulings are very interesting. This is the current list:

- o Judgment of the Court (First Chamber) of **27 November 2007. Case C-435/06.**
- o Judgment of the Court (Third Chamber) of **29 November 2007. Case C-68/07.**
- o Judgment of the Court (Third Chamber) of **11 July 2008. Case C-195/08 PPU.**
- o Judgment of the Court (Third Chamber) of **2 April 2009. Case C-523/07.**
- o Judgment of the Court (Third Chamber) of **16 July 2009. Case C-168/08.**
- o Judgment of the Court (Third Chamber) of **23 December 2009. Case C-403/09 PPU.**
- o Pending reference for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 10 July 2009 - Bianca Purrucker v. Guillermo Vallés Pérez. **Case C-256/09.**

It goes without saying that the case-law of the European Union Court of Justice in this field is of paramount significance, compulsory for all domestic judges involved in the task of implementing this Regulation inside the European Union. Out of the six judgments, two of them are very influential in the field of international child abduction and relocation. I am referring to Judgment of 11 July 2008, case C-195/08 PPU, entirely dedicated to the issue of international child abduction and to Judgment of 2 April 2009, case C-523/07 as this sets up for the first time a definition

of the concept of habitual residence in this field saying that the concept of 'habitual residence' under Art. 8(1) of Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case. At the same time and regarding provisional, including protective, measures under Art. 20, this judgment describes the conditions in which a prospective measure, such as the taking into care of children, may be decided by a national court under Art. 20 of Regulation No 2201/2003:

- the measure must be urgent;
- it must be taken in respect of persons in the Member State concerned; and
- it must be provisional.

Further, the very recent Judgment of the European Court of Justice of 23 December 2009, Case C-403/09 PPU, has put the finishing touches to the question of provisional matters saying that Art. 20 must be interpreted as not allowing, in circumstances such as those of the main proceedings, a court of a Member State to take a provisional measure in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, has already delivered a judgment provisionally giving custody of the child to the other parent, and that judgment has been declared enforceable in the territory of the former Member State. Maybe, in many respects, this ruling has given us advance warning regarding what the decision will be in the last pending reference for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 10 July 2009.

JUDICIAL APPROACH TO RELOCATION IN NEW ZEALAND

His Honour Judge
Peter BOSHIER

Principal Family Court Judge,
New Zealand



Introduction

For judicial officers involved in relocation, such cases often rank among the most difficult to adjudicate. While cases involving child abuse or domestic violence are always incredibly tragic, the necessary judicial outcome is often clear and legislation provides useful guidance on how to proceed. In contrast, relocation cases often involve two competent and committed parents, one with sound reasons for wishing to relocate, the other with equally valid reasons for resisting the application. This reality, coupled with the fact that, in large part, the principles governing this area of law are judge made, often makes an obvious outcome difficult to find.

As a consequence I see, time and again, similar facts giving rise to quite different decisions depending upon the way the judge sees the issues and the judge's philosophical view on the raft of issues that relocation cases throw up. The New Zealand Court of Appeal has acknowledged this difficulty in its seminal decisions of *Stadniczenko v Stadniczenko*⁵⁷ and *D v S*,⁵⁸ noting in the latter that "differing assessments" are available and that in the end each judge will bring his or her own "perspectives and experiences".⁵⁹ The words of Justice Frankfurter (cited by the Court of Appeal in *D v S*) that "...reason cannot control the subconscious influence of feelings of which it is unaware"⁶⁰ have great application in relocation cases.

The New Zealand Approach

New Zealand does not have a specific legislative section relating to relocation; rather the issue is considered a guardianship matter and is therefore governed, principally, by s44 of the Care of Children Act 2004.⁶¹ As a consequence any judicially determined decision must consider the welfare and best interests of the child as the paramount consideration⁶² and must take into account the principles relevant to the child's welfare and best interests set out in section 5 of the Care of Children Act 2004. This approach was very recently endorsed by the New Zealand Court of Appeal in *Bashir v Kacem*⁶³, a relocation case involving significant inter-parental conflict.⁶⁴

⁵⁷[1995] NZFLR 493, CA (NZ)

⁵⁸[2002] NZFLR 116, CA (NZ)

⁵⁹*Ibid* at para 37

⁶⁰*Public Utilities Commission of the District of Columbia v Pottak* (1952) 343, US, 451, 466 as quoted at para 37 [2002] NZFLR 116

⁶¹New Zealand's primary legislation on private child law disputes

⁶²Care of Children Act 2004 (NZ)

⁶³[2010] NZCA 96

In that judgment, the Court paid particular attention to section 5 of the Care of Children Act 2004. The Court of Appeal noted that a court should consider each of the six principles set out in section 5 to determine whether each is relevant in a particular relocation case and, having identified those principles that are relevant, should take account of them in determining the best interests of the child. The Court held that section 5 should therefore provide a framework for consideration of what best serves a child's welfare and best interests, with a partial indication of weighting as between principles.

While *Bashir v Kacem*⁶⁵ is the only New Zealand Court of Appeal judgment on relocation under the Care of Children Act 2004, two decisions of that Court, decided under the Care of Children Act's predecessor, the Guardianship Act 1968, remain pertinent to New Zealand's approach to relocation. These two cases – *Stadniczenko v Stadniczenko*⁶⁶ and *D v S*⁶⁷ – both stressed that the welfare of the child is the paramount consideration.

In analysing these two cases in detail, Professor Mark Henaghan, in his article *Going, going... gone – to relocate or not to relocate, that is the question* noted that the Court of Appeal listed factors to be weighed and balanced when determining what is best for the particular child.⁶⁸

These factors were:

1. The child's well being may lie primarily with the primary caregiver and the well being of that family unit bears on the best interests of the child. This has become known as 'the well being of the parent affects the well being of the child' factor;⁶⁹
2. The child's well being may depend on the nature of the relationship with both parents – the closer the relationship and the "more dependent the child is on it for his or her emotional well being and development, the more likely an injury resulting from the proposed move will be";⁷⁰
3. The reason for the move and distance of the move;⁷¹
4. The child's views;⁷²
5. Both parents are guardians and share in the upbringing of the child that necessarily involves a right to be consulted on decisions of importance;⁷³

⁶⁴Please note that the Court of Appeal's judgment in *Bashir v Kacem* [2010] NZCA 96 had not delivered at the time I presented at the International Judicial Conference on Cross-Border Family Relocation, Washington D.C. However, the judgment is so important to New Zealand's approach to relocation that reference is made to it in this paper.

⁶⁵[2010] NZCA 96

⁶⁶[1995] NZFLR 493

⁶⁷[2002] NZFLR 116

⁶⁸Mark Henaghan, "Going, going... gone – to relocate or not to relocate, that is the question" (paper presented to NZLS Conference – Family Law, Auckland, 18 September 2009) at 304

⁶⁹*Stadniczenko v Stadniczenko* [1995] NZFLR 493

⁷⁰*Ibid*

⁷¹*Ibid*

⁷²*Ibid* and *D v S* at para 31

⁷³*D v S* [2002] NZFLR 116 at para 28

6. The child's welfare is not the only consideration – freedom of movement is an important value in a mobile community but the child's welfare determines the course to be followed (quoting *J v C*, House of Lords).⁷⁴ Whilst freedom of movement is recognised it cannot trump the child's welfare that is legally paramount;⁷⁵
7. The welfare principle is consistent with the United Nations Convention on the Rights of the Child;⁷⁶
8. All aspects of welfare must be taken into account – physical, mental, emotional as well as development of the child's behaviour consistent with what society expects. It is a predictive assessment. It is a decision about the future;⁷⁷
9. There must be no gender bias in deciding cases;⁷⁸
10. Decisions about relocation may be affected by the longevity of existing arrangements – "in some cases the duration of the existing arrangements and the greater degree of change proposed may require greater weight to be accorded the status quo".⁷⁹
11. Decisions of courts outside New Zealand are likely to be of limited assistance because of different social landscapes. "Two relevant factors of the New Zealand scene [...] are the growth and degree of involvement of both parents in family care and a clear move in Family Court orders to ... shared care;"⁸⁰ and
12. Relocation cases are difficult but it is not appropriate to give specific guidelines about them.⁸¹

In addition to the above, New Zealand's High Court, in *Carpenter v Armstrong*⁸² has identified the following as information necessary to make a better predictive assessment into the future:⁸³

1. Identifying the developmental milestones for each child over the next five years, what each child needs to meet those milestones, which parent is most likely to be able to meet those needs without considering relocation and how the different living proposals meet those needs;
2. The views of the child, as far as feasible, on the issues;
3. What adverse effects each child is likely to suffer if the parent with day-to-day care of the child in one country does not actively foster a continuing and good quality relationship between the children and the other parent.

My own view is that the passing of the Care of Children Act 2004 signalled an important change which was

⁷⁴*J v C* [1970] AC 668, 710-711

⁷⁵*D v S* [2002] NZFLR 116 at para 30

⁷⁶*Ibid* at para 31

⁷⁷*Ibid* at para 32

⁷⁸*Ibid* at para 34

⁷⁹*Ibid* at para 35

⁸⁰*Ibid* at para 36

⁸¹*Ibid* at para 38

⁸²HC TAU CIV-2009470-511, 31 July 2009

⁸³Mark Henaghan, "Going, going... gone – to relocate or not to relocate, that is the question" (paper presented to NZLS Conference – Family Law, Auckland, 18 September 2009) at 306

bound to influence the New Zealand judiciary's approach to relocation cases. I noted this as far back as 2005 where I suggested that the Care of Children Act arguably required the Court to give greater weight to retaining contact with both parents over any other consideration.⁸⁴ I commented then that, if this approach was adopted, relocation would generally become more difficult for the custodial parent; and that section 5 of the Care of Children Act⁸⁵ indicated that parents should not relocate if to do so would have a detrimental impact on the relationship with the other parent.⁸⁶ This initial viewpoint appears to have been borne out in recent practice.

Conclusion

Unlike international child abduction, there is presently no international instrument focused on international relocation. Consequently there is varying practice worldwide. Within New Zealand, while sections of the Care of Children Act 2004 apply to relocation cases, there is no specific statutory section on relocation and thus similar facts give rise to quite different decisions depending upon the way the lawyers present the case and the way the judge assesses the matter.

I therefore believe that the sooner we have a prescriptive set of criteria, both nationally and internationally, the sooner we will have greater certainty in the law, a factor which will work for the benefit of the families and children who use our courts.

THE GERMAN JUDICIAL APPROACH TO RELOCATION

The Honourable Judge Martina ERB-KLÜNEMANN

District Court of Hamm,
Germany



Part 1: The case

(Based on a decision of the Federal German High Court of Justice, 06-12-1989, names and details are fictitious)

Wolfgang and Heidi Schmitz lived with their two children in Cologne. All of them were German citizens. Heidi was a translator for Italian language. She stayed at home in order to care for the children, while Wolfgang was working as an engineer. After separation Heidi and the children moved to Munich with the father's consent. One year later Heidi bought a house in Modena (Italy). Because of a better professional situation, she moved there together with the two children and their grandma.

Heidi applied for sole custody in Germany.

Wolfgang didn't consent. He feared to lose his visitation rights as well as an alienation of the children from German language, culture and most of all from himself as father.

Part 2: Material law

1. What is the basis for the court's decision?

- a) *In general the applicable law is the German substantive law as the children still have their habitual residence in Germany ("Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants", in future "Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children").*
- b) A parent can achieve sole custody only by order in case of consent or best interests of the child (Section 1671 BGB).

The general aspects of child's best interests are:

- principle of support
- possibility of care
- parents' will
- child's will
- preservation of cultural and religious identity
- effects of the wider family
- social ties of the child
- willingness of each parent to permit a relationship with the other parent.

In the individual case the court has the duty to take all these aspects into reasonable consideration.

⁸⁴Peter Boshier, "Relocation Cases: An International View from the Bench" (2005) 5 NZFLJ 77

⁸⁵Which states that the child should have continuing relationships with both of his or her parents

⁸⁶Peter Boshier, "Relocation Cases: An International View from the Bench" (2005) 5 NZFLJ 79

2. What does this mean in a case of relocation?

If the relocation leads to a bigger distance between the left-behind parent and the child, there is a conflict between constitutional rights, i.e. freedom of movement, against the visitation rights and also the child's right of developing its personality. In the particular case the validity of these fundamental rights must be kept, to the greatest extent possible. The guiding principle is the child's best interests.

The moving parent has the right to move wherever he or she wants to, within the country or abroad. Unless there is a risk for violation of the child's best interests, the respect for family life does not require joint custody.

This means that the court has to prognosticate the best solution for the child. Beneath the general criteria, already mentioned above, these specific aspects have to be considered in a case of relocation:

- the reasons for relocation
- child's social ties to the habitual residence and to the new country, for example grandparents
- child's knowledge of the language and culture of the new surroundings
- the individual possibilities of the child to get used to the new situation
- existence of a residence permit
- citizenship has no particular meaning
- the quality of present and future visitation rights concerning the left-behind parent and other attachment figures
- child's notions
- relocation requires acceptable reasons such as personal, family or professional motives; a typical example is the return to the original cultural and family roots.

A relocation planned in order to avoid further visitation rights is not accepted.

In case of a better qualification of the moving parent, the visitation rights are weaker and have to step back. In this case the German courts don't consider whether it would be better for the child's situation if the leaving parent would stay at the habitual residence.

This means that the German courts mostly accept relocations with the closest attachment figure, especially when the children are younger.

In the particular case of Family Schmitz the Federal High Court of Justice reasoned as follows:

There are no mistakes in the Supreme Court's decision, giving the custody rights to the mother. Till the moment of relocation, Heidi was the most important person for the children. In addition to this, the children have told the court that they enjoy their life in Italy and that they get along in school.

The exercise of the visitation right will become more complicated, but it's the father's duty to handle this in

the future. The children's best interests are not affected by the relocation. Both parents will guarantee the children's knowledge of the German language and culture. This knowledge will probably be less than if the children remained in Germany. But the children's development in learning a new language and culture means an advantage for them.

One remark:

Heidi has moved without her husband's consent, which means abduction. Nevertheless the court gave her sole custody because of the children's best interests. At least this abduction caused no sanctions for Heidi.

The German courts reason in the same way whether it is an in-state relocation or abroad.

In case of a relocation within Germany, the left-behind parent has less rights than in case of cross-border relocation. There is no comparable right to the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction in German law. The left-behind parent cannot appeal for return, only for sole custody. The court then balances the child's best interests.

A critic once asked: "Abduction: forbidden cross-border but allowed within the country?" He suggests an analogy of the 1980 Convention to in-state relocations. But no court has ever reasoned or decided in this way. I assume, because this is such a fundamental question, that we would need a change of the written law.

3. What about visitation rights?

The German Constitutional Court has determined (20 August 2003) that, because of the child's best interests, the court has to determine the visitation rights in cases in which it allows relocation by giving custody rights to the moving parent. This decision has to be detailed, taking into the account the child's will, age, the distance, costs, means of communication and questions of the child's company.

In general the left-behind parent has to pay the costs of visitation, even if it was the decision of the other parent to move and enlarge the distance.

Part 3: Some particulars of procedural law

There are specialized family courts in Germany dealing with the Hague cases. Parents living in the European Union or in a Member State of the 1980 Hague Convention can choose whether they apply for custody or visitation rights either at the court of the child's habitual residence or at the specialized court (Section 13 II IntFamRVG).

In general the court of the child's habitual residence has jurisdiction on custody and visitation rights (Section 152 II FamFG). In case of an in-state abduction this court can transfer the case to the court of the former habitual residence (Section 154 FamFG).

The court has to avoid delays. Time causes adjustment to the new situation. Within a period of one month an oral hearing with the parents, the youth welfare office and the guardian *ad litem* has to take place (Section 155 II FamFG). Usually the court has already spoken with the child in advance.

Part 4: A critical view

Some critics complain about a lack of sensitivity of some German courts in questions concerning cultural differences. The judges shouldn't interpret foreign parents' social purity, sympathy and responsibility with our cultural background. This would cause misinterpretation and wrong prognoses.

An example: there might be no need for a court to blame a foreign mother for not reading aloud to her child. This has a big value in our culture, but perhaps not in her culture and this mother might give other important values to her child.

In my opinion these critics are right. We have to interpret and balance with care. Cultural differences should be neither minimized nor overrated. Judges must be well informed. Intercultural meetings such as this conference have an essential value in helping judges to understand each other better and to find equitable solutions.

The Honourable Mr Justice Vikramajit SEN

Delhi High Court

It is a matter of personal regret that the 1980 Hague Convention on Child Abduction has not yet been acceded to by India. However, till date, I have not learnt of any opposition to it. Unlike Pakistan and Egypt, India has not forged any judicial protocol. This is because it is impermissible under the Indian Constitution. If India accedes to the Child Abduction Convention, there would be, in any event, no need to think of a judicial protocol.



India is a multi-religious society; the majority are Hindus and at least 20 per cent of the population is Muslim; we also have Christians, Sikhs, Jains, Buddhists as well as Tribals. India is obviously an amalgamation of all religions. Very few people realise that India has the second largest population of Muslims in the world. I would also like to emphasise that we have only regular civil courts to deal with the disputes involving personal laws. Therefore, even if Muslim law has to be applied, it would be a civil judge who would do so, regardless of whether the judge is Muslim or not. Due deference is given by the judge to the tenets of Muslim law and until now we have not had a problem on that account.

As is to be expected, divorce and custody litigation is on the rise. However, I am not aware of any relocation case *stricto sensu* because the spouses have shifted their residence. The Courts have till now viewed it as custody disputes. Custody may shift from one parent to the other as the circumstances warrant. However, I anticipate that relocation is certain to develop into a specialised field of litigation. One of the reasons why this specialisation has not already crystallised is because jobs are not so easy to come by. Therefore, movement of working spouses from one location to another is a comparatively rare occurrence, more so where both spouses are gainfully employed. But relocation cases are bound to happen, and, therefore, I am thankful to our hosts for providing an opportunity to witness the experience of colleagues across the globe and to listen to their response to this problem.

India is also a common law country. We apply the principles of *stare decisis* which makes it important and significant to get it right the first time.

However, I would summarise the issue of custody and relocation. In India, judges still think that it is the child's welfare and interests which are the focal points. Judge Boshier mentioned that there is a right of movement, and, of course, that is so. When the Congress Party in India lost power, the passport of the daughter-in-law of the erstwhile Prime Minister was confiscated. The Supreme Court recognised the right of movement as a fundamental freedom. In the present state of law

and judicial attitude, undoubtedly, any person has the right to relocate. But this right is required to be in the interests and welfare of the child. The law may develop as the number of cases of relocation increases. As of now, the abiding principle is that the welfare of the child surmounts and prevails upon the right of the parents to relocate.

In the absence of legislation, what is the judicial approach in India? Our Constitution recognises and makes it a bounden duty to apply the principles of international law, wherever it is not in conflict with any domestic law. In private international law, there may be no obstacles in implementing judicial consensus across the world. Even though India is a signatory to the 1980 Child Abduction Convention, I am aware of several cases where its principles have been applied in India, even though we are not bound by it since we have not acceded to it. This is because the majority of countries have signed the Convention and it, therefore, represents evolving international law. The Supreme Court of India has not been indifferent while dealing with human rights. The Supreme Court has referred to the Directive Principles enshrined in the Indian Constitution, which prescribes that international law should be adhered to where it is not in conflict with the domestic legislation. However, while deciding the rights of the children, the Supreme Court is conservative and still looks towards only the welfare of the child. Although foreign judgments are not binding on Indian Courts, they are given due consideration.

The Supreme Court has often chartered a different path to that in foreign courts and by virtue of Section 13 of the Code of Civil Procedure, 1908, we do not always enforce foreign judgments. The primary concern of the courts in India still remains the interests of the child and an adherence to an Indian life-style and way of thinking. The views of the Supreme Court have to be followed.

Now what does the law say? So far as India is concerned, it says that it is the father who is the guardian of the child. The only exception is legislation which says that the mother shall have custody where the child is under the age of five years. Courts, however, have granted custody to the mother even where the child is above this age, especially where a girl is concerned. It is in this manner that the custody of the children above the age of five years is not automatically handed over to the father as the court is mandated to give pre-eminence to the welfare of the child.

Without mentioning the Child Abduction Convention, the Supreme Court of India has ordered the parties in *Shilpa Aggarwal v Arival Mittal* to have their disputes adjudicated in courts in London since all the parties were domiciled in London. It is heartening to hear Lord Justice Thorpe's view that *Payne v Payne* should be revisited.

Thank you very much.

TRAVAILS OF A CHILD AND JUDICIAL APPROACH TO RELOCATION

The Honourable Mr Justice Tassaduq Hussain JILLANI

Supreme Court of Pakistan, Pakistan



The issue of relocation of children is mainly one of the by-products of the breakdown of the institution of marriage. Little do the "Romeos and Juliets" know that their mutual discord may land the star creation of their union of love in Court, and the issues of custody or relocation of the poor child would be left to be decided by the judges, social scientists and psychologists. In attempting to strike a balance between multiple and conflicting interests in these cases, judges all over the globe have found decisions to be tough, worrisome and challenging. No wonder it has been a focal point among international family law judges, practitioners and academicians.

In Pakistan, cases of relocation or custody of a child are decided in accordance with the Guardians and Wards Act, 1890 wherein the paramount consideration is the welfare of the child. Although under Islamic law a mother has a preferential right to retain custody, which includes relocation for a minor girl till the age of 12 and for the minor boy till the age of 07 with visitation rights of the non-custodial parent, this is not an inflexible rule and mostly the courts have kept in view the welfare of the child as a guiding principle. In several cases, the courts have decided in favour of the custodial parent who is invariably a mother. If the Court has passed a custody order in favour of a parent, relocation *within* the country is not an issue. In a case where the mother of the child had died when the baby boy was hardly 15 days old, the real sister of the deceased mother, on request of the minor's father, brought up the baby on an undertaking in writing that he would not demand his custody later. However, when the child grew up and came of age, the father sought his custody and moved the Court. The trial Court, the Appellate Court and the High Court decided the matter in favour of the father, *inter alia*, on the ground that under the Islamic law when a boy attains the age of 07 years, the father has a right of custody. However, the Supreme Court reversed the three concurrent findings of the courts below, mainly on the ground that the welfare of the child on the facts of that particular case should weigh with the Court when deciding the question of custody or relocation. The Court held:-

"It would, thus, be seen that welfare of the minor is the paramount consideration in determining the custody of a minor. The custody of a minor can be delivered by the Court only in the interest and welfare of the minor and not the interest of the parents. It is true that a Muhammadan father

is the lawful guardian of his minor child and is ordinarily entitled to his custody provided it is for the welfare of the minor. The right of the father to claim custody of a minor is not an absolute right, in that, the father may disentitle himself to custody on account of his conduct, depending upon the facts and circumstances of each case. In this case, the respondent-father, who sought custody of the minor, neglected the child since his birth. The minor had admittedly been under the care of the appellant since the death of his mother. Thus, visualized the mere fact that the minor has attained the age of seven years, would not ipso facto, entitle the respondent-father to the custody of the minor as of right."⁸⁷

So far as the cases which involve transnational child abduction or relocation are concerned, Pakistan is a non-Hague country but such cases are decided keeping in view the best interests of the child. In 1993 the Pakistan judiciary signed a Protocol with the UK judiciary on child abduction. That Protocol stipulates that, if the question of relocation or custody of the child is being regulated by a court in the country of the child's habitual residence, the court in the jurisdiction to which the child has been abducted or taken shall return the child to the country of origin so that the matter is decided there.

A brief overview of the case law from Pakistan jurisdiction follows:

In *Sara Palmer's case* (1992)⁸⁸ the petitioner mother moved a divorce petition in England and also sought custody of three youngest children (the elder two were already residing with her). The High Court of Justice Family Division directed that, until their majority or until further order, those children would remain as wards of the Court and must not be removed from England and Wales without leave of the Court. The respondent father in utter disobedience to the Court orders left the UK along with the aforementioned children. The mother filed a Habeas Corpus petition in the Lahore High Court. The court gave interim custody to the mother but placed a condition in the order that interim custody would be valid as long as she remained in Pakistan.

In *Hiroku Muhammad's case* (1994)⁸⁹ the petitioner mother, who was a Japanese national, married the respondent father in the country of her origin after being converted to Islam. She subsequently gave birth to a baby boy and moved to Pakistan with the father. The relationship deteriorated and the respondent-father retained the custody of the minor son who by then was six years old. The respondent-father filed an application before the learned guardian Judge for an interim custody of the child and the petitioner-mother

moved a Habeas Corpus petition before the High Court. The issues mooted were whether the High Court could interfere in Habeas Corpus proceedings during the pendency of an application before the Guardian Judge. Could the petitioner-mother be granted interim custody notwithstanding the serious allegations levelled against her impugning her character and the concern that she might flee to the country of her origin i.e. Japan? The High Court decided the matter in petitioner's favour and held:-

".....As regards nationality, it is to be seen that the minor was born in Japan and is, therefore, a Japanese National though he also carried nationality of his father. The respondent had himself gone to Japan and married the petitioner, Japanese lady with open eyes. He cannot, therefore, be heard to criticize her for being a Japanese."

In *Aya Sasaki's case* (1999)⁹⁰ the Court granted custody to the custodial parent (mother) on the grounds that a Court in Singapore had already passed an order entrusting the custody of the minor to the petitioner and the said order had to be honoured unless the same was unjust or improper. The Court also held that the petitioner mother had a preferential right to have the custody of the minor.

Again in *Ms. Lousie Anne Failey's case* (2007)⁹¹ which was decided after the UK-Pakistan Protocol was signed, the Court decided the matter in favour of the custodial parent (mother) mainly because the custodial parent had a custody order from a Court in Scotland and the child had been abducted by her father from England to Pakistan. The father took up the plea of Islamic injunctions and his desire to rear his daughter under the Islamic laws but the Lahore High Court held that even this question should be decided by the Scottish Court.

Miss Christine Brass's case (1981)⁹² is the only reported exception in which the custody of abducted minors was refused to the mother on grounds of religion despite a custody order from the court of the country of the minor's habitual place of residence. The petitioner (mother) who was domiciled in Canada got married to the respondent (father) in Ontario (Canada) and four children were born. The petitioner moved to Washington with the children. The marriage broke down and was dissolved by a court order. The custody of the daughter and the youngest son was granted to the mother, whereas the custody of the other two children (a son and a daughter) was awarded to the respondent (father). However, the latter left Canada for Pakistan along with the four children. The petitioner (mother) filed a Habeas Corpus petition in the Peshawar High Court. The mother continued to be Christian notwithstanding the marriage. The questions which came up for consideration before

⁸⁷ Mst. Nighat Firdous v. Khadim Hussain (1998 SCMR 1593).

⁸⁸ Sara Palmer v. Muhammad Aslam (1992 MLD 520).

⁸⁹ Hiroku Muhammad v. Muhammad Latif (1994 MLD 1682).

⁹⁰ Aya Sasaki v. Zarina Akhtar (1999 CLC 1202).

⁹¹ Ms. Lousie Anne Failey v. Sajjad Ahmed Rana (PLD 2007 Lahore 293).

⁹² Miss Christine Brass v. Dr. Javed Iqbal (PLD 1981 Peshawar 110).

the Peshawar High Court were: could the petitioner (mother), who was a Canadian Christian, be granted the custody of minor children notwithstanding the Muslim Personal Law? Could a foreign judgment be enforced in writ jurisdiction? And where would the welfare of the minor lie in the afore-referred circumstances? The Court dismissed the petition and held:-

".....As indicated above under the personal law of the respondent i.e. Muhammadan Law, he alone is the natural and legal guardian of his minor children and even during the period of Hizanat, the constructive custody of the children remains with the father.....Therefore, it will be against the intention of law if the minor children residing in Pakistan under a Muslim father are entrusted to the petitioner who is a Christian and who is living outside Pakistan, to be taken to Canada."

This perhaps is the only case from Pakistan Jurisdiction in which the custodial parent was denied the custody on religious grounds. I am not aware of any reported case in which this judgment from Peshawar High Court was ever followed.

In a recent case,⁹³ the Lahore High Court granted custody of the minor son to a French mother who had a custody order of a French court in her favour. The minor had been abducted and brought to Pakistan by his father. Repelling the argument that custody should not be given to his mother because she was Christian, the court held:-

"Respondent No. 1 is a previous convict, a fugitive against whom International Warrant for Arrest stands issued and he is already under arrest in this country facing a criminal charge. His antecedents are checkered as far as obeying the judicial process is concerned. He has repeatedly demonstrated through his conduct over the last many years that his passion for keeping custody of his minor son eludes or outruns his eagerness for his son's welfare. With such credentials and antecedents of respondent No. 1 mere professing of Muslim faith by him and his mere incidence of birth in Pakistan may not suffice all by themselves to conclude that welfare of the minor would lie in living with him rather than in living with a Christian mother of French origin whose credentials are blotless, whose antecedents are clean, whose proven love and care for the child has dragged her in foreign land facing untold trials and tribulations and whose courage, fortitude and character may be better suited for imbibing good moral, social and human values in the minor's personality."

One of the crucial issues which has engaged the jurists,

⁹³Peggy Collin v. Muhammad Ishfaq Malik (PLD 2010 Lahore 48, at page 54).

academics, practitioners and judges is how to develop a principle of general application which can be globally enforced. Such a uniformity in this shrunken world would help to decide such matters. Thomas Folley warns that, *"the absence of a common international approach to relocation may dilute any achievements gained in relation to trans-frontier access/contact."*⁹⁴

Gary A. Debele canvases a child-centred approach and believes that, *"regardless of the weight to be given to the child's desires, the child must be involved and represented independently in the process. Making these determinations will of course require a sensitive and well-educated judicial officer, experienced attorneys conversant in child development as well as substantive family law, and well-trained guardians ad litem, social workers, and child psychologists."*⁹⁵

Justice Dennis Duggan from the U.S. regards the "welfare test" to be too vague to be of any guide. He favours a *"system which encourages, empowers and commands parents to reach joint decisions, making suggestions which include the use of mediation and legislative bright-line rules which add predictability to the issue of relocation."*⁹⁶ While concurring with the view that the welfare test is vague, some academics have suggested amendments in the relevant law to make the "welfare checklist" more comprehensive and modelled on the Australian system. In New Zealand law as well there are provisions which provide for these considerations to be taken into account. These academics advocate a *"process change, which involves a more active role for practitioners in helping the parent parties in a potential relocation case to make informed choices."*⁹⁷

Dr. Marilyn Freeman in her instructive research paper on relocation highlights the need, *"(a) for research to be urgently undertaken specifically into the outcomes of relocation and the effects of relocation on children (b) an amendment to the welfare checklist in The Children Act 1989 (U.K) (c) a process change which enables informed decisions to be taken by parents involved in relocation issues which may include a combination of mediation, education programmes and practitioner information sessions (d) the appointment of a guardian in relocation cases."* According to her, this is essential *"in cases involving very young children,*

⁹⁴International Child Relocation: Varying Approaches among Member States to the 1980 Hague Convention on Child Abduction.

⁹⁵A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard by Gary A. Debele, Children's Rights Vol. 15, 1998.

⁹⁶A judicial rule that helps resolve ambiguous issues by setting a base standard that clarifies the ambiguity and establishes a simple response-<http://legal-dictionary.thefreedictionary.com/Bright-line+rule> as quoted by Dr. Marilyn Freeman in Relocation: The Reunite Research Unit.

⁹⁷Parkinson, "The realities of relocation: Messages from judicial decisions" (2008) 22 Australian Journal of Family Law, pp 35-55 at 55. As quoted by Dr. Marilyn Freeman in Relocation: The Reunite Research Unit.

*where the relocation has the potential to threaten the heart of the relationship-building in which a young child engages with its parents and wider family”.*⁹⁸

However, there are many factors which weigh with courts when deciding issues of relocation. Some factors can be statutory, some reflected in the precedent case law and others may be canvassed by psychologists or evaluators. Laying down a uniform list of factors which a Family Judge should consider may remain illusive because each case has its own distinct features; the social context from which the case originates, the capacities of both the custodial parent and the left-behind parent and the level of the child's intimacy with each. The issue of welfare of the child has to be resolved in light of these considerations. No inflexible rule therefore can be laid down and each case has to

be examined on its own merits. But to decide which factor or consideration or approach may weigh with the Court in a particular case requires a certain ability and conduct by a Judge. He should proceed with an open mind because *“a judge who is called upon to decide such cases should not have any bias in one direction or the other most of the times.”*⁹⁹ He should not only be well versed in the relevant law but should also have some understanding of child psychology, should be able to visualize the effect of the order that he proposes to pass on the child and on the custodial parent, should be creative in offering more than one alternative solution, keeping the best interests of the child in mind and should be persuasive and attempt to make the parties agree a settlement through ADR or mediation. Such an approach, I believe, is the one which the judges both from Common Law and Civil Jurisdiction should follow.

⁹⁸At their fn 97 they cite Parkinson and Cashmore who suggest from preliminary findings of a research project about relocation disputes that the high level of conflict between the parents in their sample may relate to the effect of litigation driving people into corners compounded by the crippling cost of litigation and the cost of funding contact at a distance.

NB Patrick Parkinson has suggested that guidance is also required on how judges should apply the terms of the welfare checklist regarding the requirement to maintain contact with both parents. He states that: “In determining whether a parent's proposed change of location is in the best interests of the child in cases where: (i) their parents have or will have equal shared parental responsibility (ii) the child has been consistently spending time on a frequent basis with both parents, and (iii) the child will benefit from maintaining a meaningful relationship with both parents, an outcome that allows the child to continue to form and maintain strong attachments to both parents, and to spend time on a frequent basis with both parents, even if it is not as frequent as before, shall be preferred to one that does not”. Freedom of Movement in an Era of Shared Parenting: The Difference in Judicial Approaches to Relocation - http://papers.ssrn.com/so13/papers.cfm?abstract_id=1181442. As quoted by Dr. Marilyn Freeman in Relocation: The Reunite Research Unit.

⁹⁹Avoiding Bias in Relocation Cases by Philip M. Stahl.

4. CENTRAL AUTHORITY PERSPECTIVES ON RELOCATION

IMPLEMENTATION OF THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION IN THE UNITED STATES

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The United States signed the Hague Convention on the Civil Aspects of International Child Abduction (Convention) on December 23, 1981, and ratified it on July 1, 1988. Then-Secretary of State George P. Shultz submitted the Convention to the White House on October 4, 1985, at which time he recommended that the United States enter two reservations upon ratification, both permitted by Article 42 of the Convention: (1) that documents sent to the U.S. Central Authority be accompanied by translations into English (Art. 24), and (2) that the United States not be bound to assume legal costs of proceedings under the Convention ("Hague proceedings") (Art. 26), except insofar as these costs may be covered by a legal aid program.¹⁰⁰ In his

letter of transmittal of the Convention to the Senate, dated October 30, 1985, then-President Ronald Reagan recommended "early and favorable consideration" of the Convention as an "important addition to the State and Federal Laws currently in effect in the United States that are designed to combat parental kidnapping."¹⁰¹

The U.S. Congress in 1988 passed the implementing legislation, titled the International Child Abduction Remedies Act (ICARA),¹⁰² laying out the specifics of U.S. obligations under the Convention, including the details of judicial remedies (e.g., jurisdiction, burdens of proof), provisional remedies, admissibility of documents, and functions of the USCA. The President designated the Department of State as the federal agency to serve as Central Authority for the United States,¹⁰³ and the Department of State further delegated the duties imposed by the Convention and ICARA to the Office of Children's Issues (CI) as the USCA.¹⁰⁴

Concurrent Jurisdiction

Of particular interest in U.S. implementation of the Convention is the decision of Congress to confer concurrent original jurisdiction to hear Convention cases on both state and Federal courts.¹⁰⁵ The original bill passed by the House of Representatives called for state court jurisdiction only, in keeping with the tradition in the United States that state courts handle family law matters. The Senate, however, added a single amendment, providing for concurrent jurisdiction with



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¹⁰⁰ 51 Fed. Reg. 10495 (1986).

¹⁰¹ Id. at 10497.

¹⁰² 42 U.S.C. § 11601 et. seq.

¹⁰³ Ex. Order No. 12648, 53 Fed. Reg. 30637 (1988).

¹⁰⁴ 22 CFR 94.2.

¹⁰⁵ 42 U.S.C. § 11603(a).

federal courts. The legislative history of ICARA shows the reasoning: federal courts would have jurisdiction regardless of the legislation, by virtue of the fact that the Convention is a federal treaty. Congress decided that providing concurrent jurisdiction in the legislation would help prevent delay in resolution of cases by preventing the possibility of litigation over jurisdiction in a particular case.¹⁰⁶

Reservation under Article 26: Representation of Hague Litigants in the United States

The USCA recognizes that one of our greatest challenges in ensuring effective functioning of the Convention in the United States is assisting applicant parents abroad to locate competent and affordable legal counsel. Unfortunately, locating affordable counsel is a problem shared by U.S. residents in private litigation. Costs for private attorneys are high, and publicly funded legal assistance is a patchwork of programs with varying mandates, managed largely at the local level. Except in criminal cases, residents of the United States have no right to legal counsel, and many litigants in family matters represent themselves. In light of this reality, if Congress had wished to subsidize litigation costs for foreign petitioners under the Convention, it would have had to create an entirely new and unprecedented legal assistance program in the United States – something that would have been politically nearly impossible.

The resulting U.S. implementing legislation provides that petitioners are liable for attorneys' fees, court costs, and travel costs, "unless they are covered by ... Federal, State, or local legal assistance or other programs."¹⁰⁷ A consolation is that successful petitioners may seek reimbursement of costs from respondents; specifically, U.S. courts ordering return are required to order the respondent to pay all costs for litigation, interim care, and return of the child, "unless the respondent establishes that such order would be clearly inappropriate."¹⁰⁸

Recognizing that costs of litigation can be prohibitive, the USCA, in cooperation with the National Center for Missing and Exploited Children (NCMEC) and the American Bar Association, established a network of attorneys throughout the United States who have expressed an interest in handling Convention cases on a reduced-fee or *pro bono* basis. That program, originally called the International Child Abduction Attorneys Network (ICAAN), has continued after April 1, 2008 in the Office of Children's Issues as the Department of State Attorney Network. The USCA continues targeted outreach to bar associations in states with a high volume

of abduction cases and continually adds new attorneys to the Network. When Network attorneys are not available, the USCA works with legal aid organizations, which exist in every region of the United States and can provide legal assistance to financially eligible LBPs in some cases. Because the USCA cannot make direct referrals to specific attorneys, the USCA instead contacts several attorneys for each case who agree to discuss possible representation with the applicant. The USCA then supplies to the foreign Central Authority the names and contact information for up to three possible attorneys, to be forwarded to the applicant. The applicant then must directly contact an attorney to discuss the possibility of representation.

Once an attorney takes on a case, the USCA provides assistance in many forms, including a simultaneous telephone translation service to ease attorney-client communication where attorney and client do not speak the same language. The USCA website provides links to relevant laws and regulations, the Permanent Bureau's explanatory report, the U.S. legal analysis of the Convention, as well as links to the NCMEC website, where attorneys can find model pleadings and a thorough guide to litigating Convention cases. Attorneys may also be referred to experienced mentor attorneys who have volunteered to assist when needed.

Education of the Judiciary and the Hague Network Judges

In light of the many judges, both state and federal, who may hear a Hague Convention case, the task of educating the judiciary in the United States is daunting. As a preliminary matter, in all cases in which the USCA becomes aware that a Convention case has been assigned to a judge, the USCA sends a letter to the judge that gives an overview of Convention obligations and provides links to the primary source materials that can help a judge understand his or her role, as well as the role of the USCA. The letter also informs judges that they can contact the USCA with questions if needed.

In addition, the letter explains the role of the U.S. Hague Judicial Network. Judges hearing cases in the United States can contact these expert judges for explanation or assistance. With the cooperation of the USCA, Network judges can also arrange for direct communication between judges in the United States and judges in countries that have a treaty relationship with the United States under the Convention ("partner countries"), who may need clarification of issues relating to a specific Convention case before returning children, both to and from the United States.

Consistent with our obligations under Article 11 of the Convention, the USCA also sends letters to judges when a case in their court has not been decided within six weeks, particularly when an applicant or foreign Central Authority has inquired about the reasons for the delay. Another letter, per Article 16, informs state court judges who may be hearing a related custody matter of the

¹⁰⁶ See comments of Congressman Benjamin Cardin, who noted as well that the legislation was in no way intended to "expand Federal court jurisdiction into the realm of family law," and that the Congress wished to reaffirm its view that state courts continue to have the jurisdiction and subject matter expertise. 134 Cong. Rec. 54704-04 (1988)

¹⁰⁷ 42 USC § 11607(b)(2).

¹⁰⁸ Id. at § 11607(b)(3).

Convention requirement to hold in abeyance any ruling on the merits of the custody dispute until the Hague questions have been decided.

The USCA understands the need for broad domestic efforts to educate judges within the United States. We participate in state and federal judicial conferences when possible, providing presentations about the Convention and its principles, and explaining the role of the USCA as a resource and facilitator of Convention litigation. The National Judicial Conference in Reno, NV, a center for judicial education in the United States, has held a national level training conference for both federal and state judges on the Convention. In addition, the Federal Judicial Center (FJC) in Washington, DC, the research and education agency of the federal judicial system, produced a training video on the Convention in 2005, available to federal judges on the FJC website. Within the past year, CI has participated in a judicial training for state judges in Florida with one of our Network judges. Our Hague Network judges themselves travel to train other judges and are exploring a program to establish expert judges in every state. By participating in programs such as the conference today, they demonstrate the leadership role they have taken on in international family law in the United States. The USCA appreciates the need to establish an ongoing program of judicial education and that such an effort will be critical to maintaining consistent and appropriate interpretation of the Convention in the United States.

U.S. Central Authority Structure and Function

The USCA, with the largest case load in the world, was first established within the Office of Overseas Citizen Services, with a small staff. In 1994 the Department of State established CI, whose officers were responsible for abduction, adoption, and prevention cases for their country portfolios. In 1996, NCMEC agreed to help the USCA by taking on the work of all incoming cases under the Convention. Their help was vital, as they had at hand significant resources for locating children in the United States. They became important partners in both the U.S. and international effort to promote good practice under the Convention.

The work of CI continued to grow, especially as the Department of State became responsible for drafting regulations implementing the Convention. A new Adoption Division within CI focused on the extensive preparation required to become the U.S. Central Authority for the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption, and fully undertook that work upon its entry into force on April 1, 2008.

Abduction work grew at the same time. By the late 1990's, CI routinely had more than one thousand open and active outgoing cases, to both Hague partner countries and non-Hague countries. Congress took notice in 1999, held hearings, and amended the U.S. implementing legislation, adding new requirements for

CI. To promote better service to their left-behind parent constituents, Congress set a limit of 75 on the average number of cases per CI case worker.¹⁰⁹ It stipulated that the Director of the CI would be "an individual of senior rank who can ensure long-term continuity in the management and policy matters of the Office and has a strong background in consular affairs."¹¹⁰ Finally, Congress instructed the Secretary of State to name an officer in each diplomatic mission abroad to serve as a point of contact on matters related to international child abduction.¹¹¹

The "Compliance Report"

At the same time, in response to complaints from constituents that particular Convention partner countries were not returning children to the United States, Congress added a new requirement for the USCA: an annual report to Congress on the compliance of treaty partners with the Convention. The law specified that the report must include, inter alia: the number of applications that remain unresolved more than 18 months after their filing with a foreign Central Authority (and details of efforts to resolve each such case); a list of the countries to which these children were taken or a list of countries that have "failed to comply with the obligations" under the Convention; a list of the countries that have "demonstrated a pattern of noncompliance" with the Convention; and a list of countries that have failed to promptly enforce final orders for return or access.¹¹² The compilation and subsequent publication of this annual report has generated increased public notice over the past decade, especially as the problem of international parental child abduction has developed a higher profile in the media. The report has served as a valuable catalyst for change in several cases, as discussions with partner countries have led to improvements in implementation and cooperation. The report has also been a source of friction between the United States and some partner countries. It is important to note that this congressionally required report is intended to highlight areas of concern, with an eye to intensifying efforts to address those issues, and is not intended to suggest that the USCA's own performance is flawless. The USCA continues to work to refine the report to maximize its value to Congress, to the audiences in the United States (e.g., attorneys, courts, left-behind parents), and to our Convention partners.

The USCA Today

How far has the USCA come today? Although we can never be complacent about the work and the future, we believe we are steadily improving our own performance. Our staff has grown from a handful in 1988 to more than 60 abduction case officers, case assistants, and

¹⁰⁹ 42 U.S.C. 11608a(b).

¹¹⁰ Id. at § 11608a(a).

¹¹¹ Id. at § 11608a(c).

¹¹² Id. at § 11611.

specialized managers for four broad country portfolios. Our caseload with Mexico alone is so large that one unit focuses exclusively on cases of children abducted to Mexico. In April 2008 the USCA resumed handling of incoming cases, after twelve years of excellent assistance from NCMEC. An Incoming Division of ten officers and staff now manages all incoming cases. This change has enabled us to reassess the management of incoming cases and work to improve the level of the services we provide. A full-time Legal Assistance Coordinator is devoted to helping Convention applicants secure attorneys and to expanding our network of qualified attorneys. We have developed an array of resources to locate children and their abductors in the United States, including the recent addition of an in-house Diplomatic Security agent to help us access essential law enforcement resources. We have plans for developing mediation as a resource for applicants in the United States, and we are moving forward on preparations needed to sign and implement the 1996 Hague Convention on Protection of Children.¹¹³

The USCA has a unique and powerful partner in the state of California and recognizes the critical work done there by the office of the Attorney General. California has for many years helped resolve family abductions quickly and effectively. It funds a program that gives resources to local District Attorney's (DA's) offices, who locate abducted children and quickly bring cases to their courts for resolution. DAs appear on behalf of the court, but not on behalf of either parent. A large number of Convention cases in California are processed and concluded in this manner. If issues arise in a case in which the Convention applicant would need his or her own counsel (e.g., to raise defenses to return), the USCA is available to help the applicant to procure legal representation. The USCA appreciates the excellent model that the state of California has developed and hopes to be able to expand this model to other key states where abduction numbers are high.

Recent high-profile cases have demonstrated just how much Congress and its constituents, our left-behind parents, expect of the USCA. A recent case in South America was closely followed by the press as well as by citizens and governments worldwide. Although intense diplomatic efforts and media attention may have played a role, the credit for the successful outcome belongs to the Central Authority and the judiciary, which has introduced significant reforms that should ensure that future cases are resolved promptly. Other very difficult cases from non-Hague countries attract the attention of the public, Congress, and the USCA.

The USCA continues to accord high priority to bilateral and multilateral efforts to better address the problem of international parental child abduction. Working directly

with treaty partners, we arrange meetings to address problems as they arise and offer assistance where it may be needed. We strongly support the efforts of the Hague Permanent Bureau and its good work to establish training and technical assistance programs, as well as its production of the excellent Guides to Good Practice under the Convention. We have joined with other partner countries to help address shared concerns about treaty implementation in particular countries. Our Network judges participate in seminars and judicial trainings around the globe. Finally, we continually urge non-Convention countries to recognize the benefit of participating in the Convention, using seminars and diplomatic meetings to increase understanding of the nature of the problem and the potential of this civil mechanism to provide solutions. In all these efforts, the USCA affirms the highest goal – to protect children from the harm caused by international abductions and to deter future abductions.

Looking Forward – The Future is Bright

The USCA finds itself now at a turning point. Secretary of State Hillary Rodham Clinton has clearly signaled her commitment to help combat the scourge of international parental child abduction. Our embassies have intensified their engagement with host countries to encourage implementation of or support for the Convention. The Department of State has committed significant new resources to the USCA, with increased recruitment of qualified staff and expanded training and outreach. Our prevention efforts are now more focused, with specialized staff devoted to helping deter this growing problem. The management structure of the USCA has grown, with the addition of more and higher-level managers who are dedicated to continuing excellence. We are revising our case management and tracking systems. Most important, the USCA looks towards the future with a renewed commitment to improve our own performance under the Convention, to support the effective functioning of the Convention, and to cooperate fully with our Convention partners, working tirelessly to prevent and effectively address the tragedy of international parental child abduction.

¹¹³ Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996.

CENTRAL AUTHORITY OF MEXICO

Mr Johannes Jácome CID*

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At the Central Authority in Mexico we are in charge of providing services to Mexican Nationals who are facing problems with local authorities overseas. Of course one of the most important services we provide is giving assistance to Mexican minors, most often in the United States, Europe and South America. The issues we have to deal with include, amongst others, international restitution, child support and adoption.

We have a very large case load in Mexico. To give you an example, in 2009 we opened approximately 200 new cases just between the United States and Mexico, and we have to add to this amount our already existing cases, as well as the cases with the rest of the world. We also have many cases which are detected by the consular net that we have in the United States. We have 51 consulates in the United States. Minors who are detected unaccompanied, as we call them, already residing in, or in transit to, the United States are often detected either by Mexican consulates, immigration authorities, or local enforcement agencies, as well as by child protective service agencies in the United States. In 2009 we co-ordinated the relocation back to Mexico of almost 16,000 children. So that is the main work for the Mexican Ministry of Foreign Affairs, the question of the protection of Mexicans abroad. And of that 16,000, over 200 were restitution cases. This shows both the number and variety of cases we have. When we interviewed those 16,000 children returning to Mexico, 3,000 of them explained that they moved to the United States for family reasons. So this could be 3,000 potential Hague cases. They did not get to the USA because they were detected by agencies.

We also see lots of cases where a child is already in custody in the United States. I am going to talk about the United States, since this is where we have the most cases. So, for example, the child might be under the jurisdiction of a juvenile agency or a child protective services agency. Often the agency finds the child and they then find the parents living in Mexico, and they want to return the child. It is very interesting to look at how to manage a case when the decision that has to be made is whether a child has to be relocated when his habitual residence was where the parents are. And of course the case will come to the attention of the immigration authorities and this is when we have the most intriguing and complex cases. For instance, we have all been listening to the cases where one parent is trying to relocate, is willing to relocate, but we have cases where the parent is not willing to relocate, but is forced to because we have an act of an authority deporting him. We have hundreds of cases like this. Are these Hague cases? Is this person actually authorised to take his children to Mexico or not? We also have cases where the immigration process involves a parent having to return to Mexico to wait for an appointment before a U.S. official as to whether they can return to the USA. If the authorisation is given, they will return to the United States with the children. Most of the children are U.S. nationals because they were born in the United States. What if the application is denied and the mother has to remain in Mexico and the child is now residing in Mexico with her? Is this a retention or is it abduction?

These kinds of cases are very complicated. In order to address these issues we need to work together and we need to get to know each other and the particularities of each of our legal systems. When we do this, we will realise how complex the issues are, as I have shown with Mexico and the United States, and we will then be in a better position to work to advance the situation. Thank you very much.

* Editor's note: this speech has been transcribed from the recording of proceedings and edited at the Permanent Bureau of the Hague Conference on Private International Law

CENTRAL AUTHORITY OF ARGENTINA**Mrs Sabrina FARAONE****Central Authority, Argentina**

As established in the Guide to Good Practice on Transfrontier Contact, the problem of child relocation is becoming increasingly frequent among the States signatory to the 1980 Hague Convention. It involves a child being moved or relocated together with the person under whose care the child is, to a new country, in order to settle there with the person having custody rights over him. Often this situation will cause the other parent great difficulties as regards maintaining contact because, in general, the distance becomes greater and the costs for exercising the rights of access increase. In this respect, and based on the abovementioned Guide to Good Practice, it should be noted that the terms and conditions of the order granting the rights of access issued within the context of relocation must be observed by the courts or authorities of the country of relocation, thus guaranteeing such access.

Where conflict arises in the face of these situations, judicial or administrative authorities are in charge of addressing the problem in order to guarantee the actual exercise of the right of access and the child's contact with both parents. For this purpose, cooperation between the Central Authorities in order to coordinate the details, follow-up and control of the cases is extremely important. In this regard, as of this date, the Argentine Republic is not a party to the 1996 Hague Child Protection Convention. In view of the foregoing, it was determined that the Central Authorities must promote voluntary agreements between the parties, regardless of the stage of the proceedings, taking into account, for such purposes, the possibility of resorting



to the mediation mechanism; in the case of Argentina, we resort to friendly or voluntary agreements.

With respect to the Argentine Central Authority, we have only had few opportunities to address this problem, but we have dealt with three cases which should be mentioned.

The first one is a case involving Canada. The trial and appellate courts in Argentina ruled that the retention had been wrongful and they ordered the return of the child to Canada. The court confirmed that the concept of habitual residence is a factual situation and bears no relation to the notion of domicile. After the return of the child to Canada, the mother was granted custody and was allowed to relocate to Argentina, while the father was granted rights of access to be exercised in Canada.

The second one is a 2005 case involving Spain, in which the father of the child requested the return of his daughter to the Argentine Republic. However, at the hearing before the Court, the parties agreed on a visitation schedule for the father in Spain. Finally, the parties agreed on the relocation of the child to Spain and the father was granted rights of access to be exercised in the Argentine Republic.

Finally, in 2006 we dealt with a case involving the Republic of Paraguay, in which the father requested the return of his daughter to that country. Nevertheless, the parties eventually agreed on a visitation schedule before this Central Authority and the applicant authorized the settlement of his daughter in the Argentine Republic before the Court for Lomas de Zamora which heard the case.

The issue of relocation was present in all three cases: in the first case, by court order and in the other two, because the parties reached an agreement. In all of them, the parties complied with what they had agreed upon, so there was no need for further interventions.

5. LEGAL INSTRUMENTS RELATED TO RELOCATION

INTERSTATE AND INTERNATIONAL CHILD CUSTODY DETERMINATIONS UNDER THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

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I. Introduction

In the United States the problems of domestic relations, including the subjects of marriage, divorce or dissolution of marriage, maintenance, division of marital property, custody and access to children, as well as other areas of parental responsibility, are almost exclusively within the control of the individual states. Since each individual state is solely competent to decide cases involving problems of domestic relations, such as custody and visitation issues, they relate to each other in the same way as independent countries. It therefore became necessary to develop some method to determine which state has jurisdiction to decide issues involving custody of and access to children.

The first major attempt to provide uniform rules with regard to jurisdiction and recognition of judgments in interstate cases involving custody of children occurred in 1968 when the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Child Custody Jurisdiction Act (UCCJA). The UCCJA was ultimately adopted by all fifty states, the District of Columbia and the Virgin Islands.

The UCCJA provided that states would recognize and enforce child custody determinations where the court had jurisdiction under the provisions of the UCCJA. The UCCJA provided for four concurrent bases of jurisdiction: home state, significant connections, emergency, and necessity. It did not specifically provide for continuing jurisdiction, although most courts that considered the problem implied a continuing jurisdiction requirement. Although the UCCJA achieved wide adoption, a number of adoptions significantly departed from the original text as promulgated by NCCUSL. In addition, almost thirty years of litigation since the promulgation of the UCCJA produced substantial inconsistent interpretations by state courts. As a result, the goals of the UCCJA were rendered unobtainable in many cases.¹¹⁴

¹¹⁴ One of the main reasons why the goals of the UCCJA were not accomplished is because the goals were incompatible. The UCCJA embodied two main goals: First to prevent parental kidnapping of children by attempting to provide clear rules of jurisdiction and enforcement. Second to provide that the forum which decided the custody determination would be the

In 1980, the federal government enacted the Parental Kidnapping Prevention Act (PKPA),¹¹⁵ to address the interstate custody enforcement problems that continued to exist after the adoption of the UCCJA. The PKPA mandates that state authorities give full faith and credit to other states' child custody determinations, so long as those determinations were made in conformity with the provisions of the PKPA. The PKPA provisions regarding bases for jurisdiction, restrictions on modifications, preclusion of simultaneous proceedings, and notice requirements are similar to those in the UCCJA. There are, however, some significant differences. The most important examples are the PKPA's primacy for home state jurisdiction over all other bases and authorization of continuing exclusive jurisdiction in the original decree state so long as one parent or the child remains there and that state has continuing jurisdiction under its own law. To further complicate the process, the PKPA partially incorporates individual state UCCJA law in its language. The relationship between these two statutes became "technical enough to delight a medieval property lawyer." Homer H. Clark, *DOMESTIC RELATIONS* §12.5 at 494 (2d ed. 1988).

As documented in an extensive study by the American Bar Association's Center on Children and the Law, inconsistency of interpretation of the UCCJA and the technicalities of applying the PKPA, resulted in a loss of uniformity of approach to child custody adjudication among the states. This study suggested a number of amendments which would eliminate the inconsistent state interpretations and harmonize the UCCJA with the PKPA.¹¹⁶

forum that could make the most informed decision. These goals proved to be mutually incompatible. As a result courts rendered decisions that were doctrinally inconsistent as they provided for the primacy of one goal or another depending on the result they wished to accomplish in an individual case. Ann Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act*, 1992 *University of California Davis Law Review* 845 (exhaustively and authoritatively documenting how the inconsistency of the UCCJA goals produced inconsistent court decisions).

Ultimately the Drafting Committee of the replacement for the UCCJA, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), concluded that no coherent act could be drafted which attempted to maintain the primacy of both goals. Therefore, while trying not to lose sight of the promise of individual decision making, the focus of the UCCJEA is that it is more important to determine which state has jurisdiction to make a determination than to find the "best" state court to make the determination. See Robert G. Spector, *International Child Custody Jurisdiction and the Uniform Child Custody Jurisdiction and Enforcement Act*, 33 *New York University Journal of International Law and Politics* 251 (2000).

¹¹⁵ 28 U.S.C. §1738A.

¹¹⁶ In addition in 1994 NCCUSL's Scope and Program Committee adopted a recommendation of the NCCUSL Family Law Study Committee that the UCCJA be revised to eliminate any conflict between it and the PKPA. In the same year the Governing Council of the Family Law Section of the American Bar Association unanimously passed the following resolution at its spring 1994 meeting in Charleston, South Carolina:

In 1995 NCCUSL appointed a Drafting Committee to revise the Uniform Child Custody Jurisdiction Act. That revision, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was promulgated in 1997 and, as of this writing, has been adopted in forty-eight states, the District of Columbia and the Virgin Islands.

II. The International Case: The UCCJA

The UCCJA authorized states to take jurisdiction of a child custody determination when one of four circumstances existed: the state was the home state of the child or had been the home state of the child within six months of the commencement of the custody proceeding if a parent or person acting as a parent continued to reside in the state; the child or the child and one parent had substantial connections with the state and there existed in the state substantial evidence concerning the child's future care; there was an emergency; no other state would have jurisdiction to make a custody determination. States were also required to enforce custody determinations made consistently with the jurisdictional principles of the UCCJA and were not to modify custody determination made by other states unless the other state no longer had jurisdiction under the UCCJA and the state which sought to modify the determination did have jurisdiction under that act. States were required to decline jurisdiction if another state had assumed jurisdiction in accordance with the UCCJA. States were also authorized to decline jurisdiction if another state would be a more convenient forum and, in certain circumstances, where the petitioner had engaged in reprehensible conduct.

Section 23 of the UCCJA provided that the general policies of the Act applied to foreign custody determinations. Foreign custody determinations were to be recognized and enforced if they were made consistently with the UCCJA and there was reasonable notice and opportunity to be heard. There were two types of issues that arose under this section. The first was whether a United States court would defer to a foreign tribunal when that tribunal would have jurisdiction under the UCCJA and the case was filed first in that tribunal. The second issue was whether a state of the United States would recognize, under this section, a custody determination made by a foreign tribunal.

On the first issue, the UCCJA was ambiguous and only

RESOLUTION

WHEREAS the Uniform Child Custody Jurisdiction Act (UCCJA) is in effect in all 50 of the United States, and the Federal Parental Kidnaping Prevention Act (PKPA), 28 U.S.C.A. §1738A, governs the full faith and credit due a child custody determination by a court of a U.S. state or territory, and

WHEREAS numerous scholars have noted that certain provisions of the PKPA and the UCCJA are inconsistent with each other, THEREFORE BE IT RESOLVED the Council of the Family Law Section of the American Bar Association urges the National Conference of Commissioners on Uniform State Laws (NCCUSL) to study whether revisions to the UCCJA should be drafted and promulgated in a revised version of the uniform act.

required application of the "general policies" of the Act. Frequently courts in the United States would apply the same jurisdictional principles to international cases that they would apply in interstate cases. However, not all states followed the same practice. Most American states enforced foreign custody orders if made consistently with the jurisdictional standards of the UCCJA and reasonable notice and opportunity to be heard were afforded all participants. However, four states refused to enact §23 of the UCCJA and thus were able to undermine the UCCJA principles of recognition and enforcement of custody determinations by countries with appropriate jurisdiction.

III. The International Case: The UCCJEA

Section 105 of the UCCJEA provides that a court of the United States shall treat a court of a foreign country as if it was a state of the United States for the purposes of applying the jurisdiction and cooperation sections of the Act. It further provides that a court of the United States shall enforce a foreign custody determination if it was made under factual circumstances in substantial conformity with the jurisdictional provisions of Article 2 of the UCCJEA. However, a court need not apply this section if the foreign custody law would violate fundamental principles of human rights. Thus the United States will follow the same principles of jurisdiction in international cases as it would follow in cases between states of the United States. Those jurisdictional principles are as follows.

IV. Jurisdiction Under the UCCJEA and the PKPA

A. Custody Proceeding

The first issue in any case involving children is to determine whether the jurisdictional rules contained in the UCCJEA are applicable. The UCCJEA provides that these rules apply any time a child custody determination will be made in a child custody proceeding. Section 102(3) defines a child custody determination as a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term, however, does not include an order relating to maintenance of a child, child support or other monetary obligation of an individual. It encompasses any judgment, decree or other order which provides for the custody of, or visitation with, a child, regardless of local terminology, including such labels as "managing conservatorship" or "parenting plan."

B. Original Jurisdiction

1. Home State Jurisdiction

Jurisdiction to make a child custody determination as an original matter is governed by Section 201 of the Uniform Child Custody Jurisdiction and Enforcement Act. That section provides for one primary jurisdiction and a number of subsidiary jurisdictions. Primary

jurisdiction resides in the child's home state. Home state is defined in Section 102(7) as the state in which a child has lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

Section 201 of the UCCJEA gives exclusive jurisdiction to the state that is the home state of the child. It also provides that this "home state" jurisdiction extends to cases where the state was the home state of the child within six months before the commencement of the proceeding and the child is absent from the state but a parent or person acting as a parent continues to live in the state. Therefore if a parent leaves the home state of the child, the remaining parent, or person acting as a parent, has six months to file a custody proceeding in that state. If the remaining parent does so, then that state can exercise home state jurisdiction. If such a proceeding is not filed by the left-behind parent and the child subsequently acquires a new home state, then the new home state is the only state that can exercise jurisdiction over the custody determination.

In the United States, jurisdiction attaches at the commencement of a proceeding. If a state has jurisdiction at the time the proceeding was commenced, it does not lose jurisdiction if the child acquires a new home state prior to the conclusion of proceedings.

2. Significant Connection Jurisdiction

If there is no home state, or any state that can exercise home state jurisdiction,¹¹⁷ then a state where the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection, other than mere physical presence, and there is available in that state substantial evidence concerning the child's care, protection, training, and personal relationships, may assume jurisdiction.¹¹⁸

The Drafting Committee for the UCCJEA debated whether to further define the terms "significant connections" and "substantial evidence." Ultimately it agreed that the terms should remain somewhat flexible. However, the Committee agreed with the Reporter for the UCCJA, Professor Bodenhemier, in her comment to the UCCJA §3(a)(2) that "there must be maximum rather than minimum contacts with the state."

It should be noted that the significant connection jurisdiction provisions of the UCCJEA, like those of the UCCJA, do not require the court to weigh the

connections of one state against those of another to find the state of the "most significant connection." A state either has significant connection jurisdiction or it does not. If more than one state could exercise significant connection jurisdiction the courts should utilize the provisions of Section 110 on judicial communication to determine which state should proceed. Upon a failure of communication the provisions of Section 206 on simultaneous proceedings will determine the appropriate forum.

In the determination of significant connection jurisdiction the focus is not whether there is evidence of the future care for the child in the jurisdiction. Instead, the jurisdictional determination should be made by ascertaining whether there is sufficient evidence in the state for the court to make an informed custody determination. That evidence might relate to the past as well as to the present or future.

3. Other Subsidiary Jurisdictional Bases

The UCCJEA also provides for jurisdiction in a state that all states having home state or significant connection jurisdiction determine would be a more appropriate forum.¹¹⁹ This determination would have to be made by all states with home state or significant connection jurisdiction. Jurisdiction would not exist under this provision simply because the home state determined that another state is a more appropriate place to hear the case if there is a state that could exercise significant connection jurisdiction.

Finally the UCCJEA retains the concept of jurisdiction by necessity as found in the UCCJA.¹²⁰ This default jurisdiction only occurs if no other state would have jurisdiction under any other provision of the UCCJEA.¹²¹

V. Temporary Emergency Jurisdiction

The UCCJEA provides for one temporary concurrent basis of jurisdiction and that is in the case of an emergency.¹²² An emergency occurs when a child is abandoned in the state or when the child, a sibling of the child, or parent of the child is threatened with mistreatment or abuse. The concurrent nature of the jurisdiction means that a court may take cognizance of the case to protect the child even though it can claim neither home state nor significant connection jurisdiction. The duties of states to recognize, enforce and not modify a custody determination of another state do not take precedence over the need to enter a temporary emergency order to protect the child.

However, a custody determination made under the emergency jurisdiction provisions must be a temporary

¹¹⁹ UCCJEA §201(a)(3).

¹²⁰ UCCJEA, §201(a)(4).

¹²¹ While this necessity or default basis of jurisdiction was retained, it probably will not be used. It is difficult to find a case where it was actually necessary to resort to it. In most cases significant connection jurisdiction would have been proper.

¹²² UCCJEA, §204.

¹¹⁷ A "significant connection" state may also exercise jurisdiction if the state that would have "home state" jurisdiction decides that the significant connection state would be a more appropriate forum to exercise jurisdiction.

¹¹⁸ UCCJEA §201(a)(2).

order. The purpose of the emergency temporary order is to protect the child until the state that appropriately has jurisdiction under the original jurisdiction provisions or the continuing jurisdiction provisions is able to enter an order to resolve the emergency.

Under certain circumstances, however, an emergency custody determination may become a final custody determination. If there is no existing custody determination, and no custody proceeding is filed in a state with appropriate jurisdiction, an emergency custody determination made under these provisions becomes a final determination, if it so provides, when the state that issues the order becomes the home state of the child.¹²³

Normally, however, there will either be a prior custody order in existence which is entitled to enforcement or there will be a proceeding which is pending in a state with appropriate jurisdiction. When this occurs the provisions of the UCCJEA allow the temporary order to remain in effect only so long as is necessary for the person who obtained the emergency determination to present a case and obtain an order from the state that would otherwise have jurisdiction. That time period must be specified in the emergency order.¹²⁴ If there is an existing order by a state with jurisdiction that order need not be reconfirmed. The temporary emergency determination would lapse by its own terms at the end of the specified period or when an order is obtained from the court with appropriate jurisdiction. The court with appropriate jurisdiction may decide that the court that entered the emergency order is in a better position to address the safety of the person who obtained the emergency order, or the child, and decline jurisdiction under Section 207. It should be noted that any hearing in the state with appropriate jurisdiction is subject to the provisions of Sections 111 and 112. These sections facilitate the presentation of testimony and evidence taken out of state. If there is a concern that the person obtaining the temporary emergency determination

would be in danger upon returning to the state with appropriate jurisdiction, these provisions should be used.

The section on emergency jurisdiction requires communication between the court of the state that is exercising emergency jurisdiction under this section and the court of another state that has appropriate jurisdiction. The pleading rules of the UCCJEA require a person seeking a temporary emergency order to inform the court of any proceeding concerning the child that has been commenced elsewhere. The person commencing the custody proceeding in a state with appropriate jurisdiction is required to inform the court about the temporary emergency proceeding.¹²⁵ These pleading requirements need to be strictly followed so that the courts are able to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

VI. Exclusive Continuing Jurisdiction

One of the most significant sections of the UCCJEA provides that the state which made the original custody determination retains jurisdiction over all aspects of that determination until the occurrence of one of two events.¹²⁶ First, continuing jurisdiction is lost when a court of the state that made the original custody determination finds that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with it and that substantial evidence is no longer available in that state concerning the child's care, protection, training, and personal relationships. In other words, even if the child has acquired a new home state, the original decree state retains exclusive, continuing jurisdiction, so long as the general requisites of the "substantial connection" jurisdiction provisions of section 201 are met. If the relationship between the child and the person remaining in the state with exclusive, continuing jurisdiction becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist. As long as one parent, or person acting as a parent, remains in the original decree state, that state is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree state stating that it no longer has jurisdiction.

Second, jurisdiction is lost when a court of any state determines that the child, the child's parents, and any person acting as a parent have not continued to reside in the original state. If the child, the parents, and all persons acting as parents have all left the state which made the custody determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in another state, as well as a court in the original decree state, can decide that the original state has lost

¹²³ Basically the principle is one of acquiescence. The left-behind parent could have filed a custody proceeding within the six month extended home state provision. The failure to do so results in the temporary order becoming permanent. Considerations of waste of resources suggest that the parent who obtained the original custody order need not always return to court after establishing home state jurisdiction to obtain a permanent order.

¹²⁴ The Drafting Committee discussed at great length whether the Act should specify the length of time that a temporary emergency order could be in effect. Several intermediate drafts limited the time to 90 days. Some members thought the time period was too lengthy in that it could supersede a determination of a court that had jurisdiction under Sections 201-203 for three months. Other members were concerned that in some states crowded dockets would prevent a court that had appropriate jurisdiction under Sections 201-203 from being able to enter an order within the 90 day period. The Drafting Committee ultimately decided not to specify a particular time and to leave it to the court that issued the temporary emergency custody determination, upon consultation with the court that would otherwise have jurisdiction under Sections 201-203, to determine the appropriate length of time.

¹²⁵ UCCJEA, §209.

¹²⁶ UCCJEA, §202.

exclusive, continuing jurisdiction. Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the state, the non-custodial parent returns.¹²⁷ The UCCJEA provides that once a state has lost exclusive, continuing jurisdiction, it can modify its own determination only if it has jurisdiction under the standards of Section 201.¹²⁸ If another state acquires exclusive continuing jurisdiction under this section, then its orders cannot be modified even if the first state has once again become the home state of the child.

Section 203 of the UCCJEA on modification jurisdiction is the mirror image of the continuing jurisdiction provisions of Section 202. It provides that a state does not have jurisdiction to modify a custody determination of another state, unless that state no longer has continuing jurisdiction and the modification state would have jurisdiction under Section 201.

The PKPA's continuing jurisdiction is broader than that of the UCCJEA. It provides that a court that has made a custody determination consistently with the jurisdictional standards of the PKPA continues to have jurisdiction so long it has jurisdiction under its own law, i.e. the UCCJEA, and one party or a contestant continues to reside in that state.¹²⁹ There is no conflict between the UCCJEA and the PKPA, since the PKPA allows a state to restrict its continuing jurisdiction by the reference in (c)(1) to the state's own law. The PKPA also acts to restrict the jurisdiction of another state by the provision in (g) to the effect that no other state shall exercise jurisdiction if the first state has jurisdiction consistently with the provisions of the PKPA.

VII. Abstention From Jurisdiction

Three sections of the Uniform Child Custody Jurisdiction and Enforcement Act speak to the question of when a state which has jurisdiction should refrain from exercising it.

1. Simultaneous Proceedings or Lis Pendis

The problem of two or more states having concurrent jurisdiction in child custody cases has always been a difficult one. Under the old Uniform Child Custody Jurisdiction Act the home state and the significant connection state had concurrent jurisdiction.¹³⁰ The same was true, under some interpretations, of the state which had originally entered the child custody

¹²⁷ Exclusive, continuing jurisdiction is not revived when, after the court that made the original determination surrenders jurisdiction to a new home state, the parent and the child leave that state for a third state.

¹²⁸ Even though a state may not have jurisdiction to modify its own custody determination, it may still enforce the determination until it is modified by some other state. See *Dyer v Surratt*, 466 S.E.2d 584 (Ga. 1996) (Georgia court may hold custodial parent in contempt of court for violating the visitation provisions of the custody determination even though it does not have jurisdiction to modify the determination).

¹²⁹ 28 U.S.C. §1738A(d).

¹³⁰ UCCJA §3.

determination and the new home state of the child. The concurrent jurisdiction problem has been significantly decreased under the UCCJEA. This occurs through the prioritization of home state jurisdiction over that of significant connection jurisdiction and through the device of giving the original decree state exclusive continuing jurisdiction, so long as the requirements of Section 202 are met.

Nonetheless, there is still one situation where concurrent jurisdiction is possible. It occurs when there is no state that can exercise home state jurisdiction, or exclusive, continuing jurisdiction, and more than one state that can exercise significant connection jurisdiction. For those cases, the UCCJEA, in Section 206, retains the "first in time" rule of the UCCJA. This section requires that before a court may proceed with a custody determination, it must find out from the pleadings and other documents that have been submitted whether a custody proceeding has already begun. If one has been commenced in a state that would otherwise have jurisdiction under the UCCJEA, it must communicate with that court.¹³¹ If the court that would otherwise have jurisdiction under the UCCJEA refuses to decline in favor of the forum, then the forum is required to dismiss the case.

2. Forum Non Conveniens

The doctrine of forum non conveniens is firmly established in American jurisprudence. Simply put, if a state that would otherwise have jurisdiction determines that some other state would be a more appropriate forum to decide the case, it may decline jurisdiction in favor of that forum. This principle is firmly established in the UCCJEA. Both the sections on home state jurisdiction and exclusive, continuing jurisdiction authorize the courts of those states to decide if another state would be a more appropriate forum, and if so, to decline jurisdiction in favor of that state.

The principles governing the process of making the forum non conveniens decision is governed by Section 207. The suggestion that a court is an inconvenient forum may be made by any party to the proceeding or by the court on its own motion. When a suggestion of inconvenient forum is made, the parties will submit information on the following factors:

- (1) whether domestic violence has occurred and is likely to continue in the future and which State could best protect the parties and the child;
- (2) the length of time the child has resided outside this State;
- (3) the distance between the court in this State and the court in the State that would assume jurisdiction;

¹³¹ The procedure in the UCCJEA parallels that of the UCCJA in that it requires the court to stay the proceeding and communicate with the court that has jurisdiction under this Act. The requirements of stay and communication should be strictly adhered to in order to prevent conflicting custody determinations.

- (4) the relative financial circumstances of the parties;
- (5) any agreement of the parties as to which State should assume jurisdiction;
- (6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (7) the ability of the court of each State to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (8) the familiarity of the court of each State with the facts and issues in the pending litigation.

Other factors not specifically mentioned may also be the basis of an inconvenient forum motion.

Although most of the factors are self-explanatory, several provisions require comment. Subparagraph (1) is concerned specifically with domestic violence and other matters affecting the health and safety of the parties. For this purpose, the court should determine whether the parties are located in different states because one party is a victim of domestic violence or child abuse. If domestic violence or child abuse has occurred, this factor authorizes the court to consider which state can best protect the victim from further violence or abuse.

In applying subparagraph (3), courts should realize that distance concerns can be alleviated by applying the communication and cooperation provisions of Sections 111 and 112.

In applying subsection (7) on expeditious resolution of the controversy, the court could consider the different procedural and evidentiary laws of the two states, as well as the flexibility of the court dockets. It also should consider the ability of a court to arrive at a solution to all the legal issues surrounding the family. If one state has jurisdiction to decide both the custody and support issues, it would be desirable to find that state to be the most convenient forum. The same is true when children of the same family live in different states. It would be inappropriate to require parents to have custody proceedings in several states when one state could resolve the custody of all the children.

Before determining whether to decline or retain jurisdiction, the court may communicate, in accordance with Section 110, with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court.

If a court determines it is an inconvenient forum, it may not simply dismiss the action. To do so would leave the case in limbo. Rather the court shall stay the case and direct the parties to file in the state that has been found to be the more convenient forum. The court is also authorized to impose any other conditions it considers appropriate. This might include the issuance of temporary custody orders during the time necessary to commence a proceeding in the designated state, dismissing the case if the custody proceeding is not commenced in the other state or resuming jurisdiction

if a court of the other state refuses to take the case.

3. Declining Jurisdiction Because of Unreasonable Conduct

One of the major purposes of the UCCJEA is to discourage parents from kidnapping their children and taking them to another state in search of a forum which may be more favorable to them. Since there is no longer a multiplicity of jurisdictions which could take cognizance of a child custody proceeding, there is less of a concern that one parent will take the child to another jurisdiction in an attempt to find a more favorable forum. Most of the jurisdictional problems generated by abducting parents have been solved by the prioritization of home state in Section 201, the exclusive, continuing jurisdiction provisions of Section 202, and the ban on modification in Section 203. For example, if a parent takes the child from the home state and seeks an original custody determination elsewhere, the stay-at-home parent has six months to file a custody petition under the extended home state jurisdictional provision of Section 201, which will ensure that jurisdiction is retained in the home state. If a petitioner for a modification determination takes the child from the state that issued the original custody determination, another state cannot assume jurisdiction as long as the first state exercises exclusive, continuing jurisdiction.

Nonetheless, there are still a number of cases where parents, or their surrogates, act in a reprehensible manner, such as removing, secreting, retaining, or restraining the child. The UCCJEA, in Section 208, ensures that abducting parents will not receive an advantage for their unjustifiable conduct. If the conduct that creates the jurisdiction is unjustified, courts must decline to exercise jurisdiction that is inappropriately invoked by one of the parties. For example, if one parent abducts the child pre-decree and establishes a new home state, that state will decline to hear the case. There are exceptions. If the other party has acquiesced in the court's jurisdiction, the court may hear the case. Such acquiescence may occur by filing a pleading submitting to the jurisdiction, or by not filing in the court that would otherwise have jurisdiction under the UCCJEA. Similarly, if the court that would otherwise have jurisdiction under the UCCJEA determines that the state where the child has been taken is a more appropriate forum, the court may hear the case.

This provision of the UCCJEA applies to those situations where jurisdiction exists because of the unjustified conduct of the person seeking to invoke it. If, for example, a parent in the state with exclusive, continuing jurisdiction under Section 202 has either restrained the child from visiting with the other parent, or has retained the child after visitation, and seeks to modify the decree, this section is inapplicable. The conduct of restraining or retaining the child did not create jurisdiction. Jurisdiction existed under this Act without

regard to the parent's conduct. Whether a court should decline to hear the parent's request to modify is a matter of local law.

The focus in this section is on the unjustified conduct of the person who invokes the jurisdiction of the court. A technical illegality or wrong is insufficient to trigger its applicability.¹³² This is particularly important in cases involving domestic violence and child abuse. Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another state to establish jurisdiction has engaged in unjustifiable conduct and the new state must decline to exercise jurisdiction under this section.

This section of the UCCJEA also authorizes the court to fashion an appropriate remedy for the safety of the child and to prevent a repetition of the unjustified conduct. Thus, it would be appropriate for the court to notify the other parent and to provide for foster care for the child until the child is returned to the other parent. The court could also stay the proceeding and require that a custody proceeding be instituted in another state that would have jurisdiction under this Act. It should be noted that the court is not making a *forum non conveniens* analysis in this section. If the conduct is unjustifiable, it must decline jurisdiction. It may, however, retain jurisdiction until a custody proceeding is commenced in the appropriate tribunal if such retention is necessary to prevent a repetition of the wrongful conduct or to ensure the safety of the child. Attorney fees shall also be awarded to the left-behind parent unless it would be clearly inappropriate.

VIII. Communication and Cooperation Between Tribunals

The UCCJEA contains specific provisions providing for communication and cooperation between tribunals of different states. The communication provisions are contained in Section 110. It authorizes a court of one state to communicate with a court in another state concerning any proceeding arising under the UCCJEA. A court may allow the parties to participate in the communication. However, participation of the parties is not required. The busy schedules of judges often require that the communication be held at odd hours when the parties are not available. This will be especially true in international cases given the major time

differences. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made. A record must be made of the communication unless the communication concerns such minor matters as schedules, calendars, court records, and similar matters. The parties must be informed promptly of the communication and granted access to the record.

The cooperation provisions of the UCCJEA are Sections 111 and 112. Section 111 is concerned with taking testimony in another state. It provides that a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child. The evidence may be by deposition or by any other means that are allowable in the state where the testimony is received. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which, and the terms upon which, the testimony is taken.

A court may also permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court is required to cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

Documentary evidence may be transmitted from courts in other states by technological means that do not produce an original writing and may not be excluded from evidence on an objection based on the means of transmission.

Section 112 lists other features of cooperation. It authorizes a court of one state to request the appropriate court of another state to:

- (1) hold an evidentiary hearing;
- (2) order a person to produce or give evidence pursuant to procedures of that state;
- (3) order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;
- (4) forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and
- (5) order a party to a child-custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

A further subsection authorizes a court to comply with any of the above requests when made by a court of another state.

Travel and other necessary and reasonable expenses incurred because of the cooperation provisions may be assessed against the parties according to the law of the state where the proceeding is to occur.

¹³² The focus on unjustifiable conduct represents a continuation of the balancing process as developed in the case law under UCCJA §8. The court should balance the wrongfulness of the conduct of the parent that establishes jurisdiction against the reasons for the parent's conduct.

Another provision of Section 112 requires a court to preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child-custody proceeding until the child attains 18 years of age. Upon an appropriate request by a court or law enforcement official of another State, the court shall forward a certified copy of those records.

IX. Conclusion

The Uniform Child Custody Jurisdiction and Enforcement Act was a major step forward in allocating jurisdictional competency in child custody cases. It will clearly indicate which state has jurisdictional competency. This furthers the policy that has been pursued by American law over the last 40 years: one state and only one state should have jurisdiction at any one time. The elimination of all concurrent jurisdiction provisions, except for temporary emergency jurisdiction, will substantially reduce the number of instances where one parent abducts the child to another state in the hopes of receiving a more favorable custody determination. The result should be greater stability for children in an increasingly unstable world.

THE IMPACT OF THE REVISED BRUSSELS II REGULATION ON CROSS-BORDER RELOCATION

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I. Introduction

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No 1347/2000, known variously as Brussels IIA, Brussels II Bis, Brussels II Revised or simply as BIIR, is an EU Regulation providing for common rules of jurisdiction and consequent recognition and enforcement of judgments. In this broad sense it is similar to the 1996 Hague Convention on the Protection of Children. Indeed the drafters had the 1996 Convention very much in mind when drawing up the Regulation.

Like the 1996 Convention the Regulation is relevant to relocation issues both because it applies to custody and access judgments *and* agreements (see respectively Articles 1(2)(a) and 46) and because it has special rules dealing with child abduction (see below). On the other hand, the Regulation has a geographically limited application in that it only applies in cases *between* EU Member States (except Denmark), though where it does apply it takes precedence over the 1996 Convention (Article 61) and, technically, over the 1980 Hague Abduction Convention (Article 60(e)), although in the

case of the latter, as will be seen, it determines how the Convention operates rather than providing for a separate scheme.

The Regulation has been in force since 1 March 2005, though in the case of the newly acceding states of Bulgaria and Romania, it has been in force only since their accession on 1 January 2007. The Regulation forms part of the *acquis communautaire*, which States joining the EU in the future (for example, Croatia and Iceland) will be required to adopt.

II. Basic Scheme

A. Scope

The Regulation applies to all civil matters relating to 'the attribution, exercise, delegation, restriction or termination of parental responsibility' (Article 1(b) and Recital (5)) and, as already indicated, rights of custody and rights of access are expressly included in the definition of 'parental responsibility' (see Articles 1(2) and 2(7)). It may be noted, however, that certain issues are expressly excluded from the scope of the Regulation and one issue that might be of some relevance to relocation issues is that of names (see Article 1(3)).

'Child' is not defined by the Regulation. This means that no maximum age is prescribed – that is left to national law. The 1996 Child Protection Convention applies to children up to the age of 18. The 1980 Abduction Convention only applies to children under the age of 16.

The Regulation applies not just to court judgments but also to decisions pronounced by an authority (e.g. social authorities); duly drawn up or registered documents *and*, as already noted, agreements between the parties, provided in each case they are enforceable in the Member State in which they were made (Article 46). This gives the Regulation wider scope than the 1996 Child Protection Convention, which does not apply to agreements.

B. The Jurisdictional Rules

Like the 1996 Convention, Chapter II, Section 2 of the Regulation creates a common approach to jurisdiction which helps to provide certainty to the parties whilst at the same time discouraging forum shopping. In common with most modern international instruments dealing with children the Regulation vests primary jurisdiction in the Member State in which the child is habitually resident (Article 8). Although 'habitual residence' can be hard to define (the Regulation itself does not attempt to do so),¹³³ together with the provisions governing child abduction (discussed below), this basic rule encourages parents to litigate on relocation issues in the State where the child habitually lives rather than removing

¹³³ Note might be taken of the ECJ ruling in *Re A (Area of Freedom, Security and Justice)* (C-523/07) [2009] 2 FLR 1, that habitual residence "must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment".

the child to another jurisdiction before determining such an issue.

As under the 1996 Convention, the Regulation allows the basic rule of habitual residence to be overridden by prorogation between the parties whether or not in the context of matrimonial proceedings (Article 12)¹³⁴ and permits the transfer to a court better placed to hear the case embodying the concept familiar to common lawyers but not civil lawyers of *forum conveniens* (Article 15). Finally, Article 20 permits, in urgent cases, the taking of provisional including protective measures, upon the basis of the child's presence in the jurisdiction.¹³⁵

C. Recognition and Enforcement

Recognition and enforcement of judgments and agreements are governed by Chapter III of the Regulation. The basic policy is that such recognition should be based upon the principle of mutual trust such that the grounds for non-recognition and enforcement are kept to a minimum. Indeed the Regulation provides for automatic recognition of any judgment or enforceable agreement made in one Member State, by any other Member State (Article 21(1)). Nevertheless, any interested party can apply for a judgment etc not to be recognised.

The grounds for non-recognition are limited: they can only be based on those provided by Article 23 and in any event there can be no review of either the jurisdiction of the court of origin (Article 24) or of the substance of the decision (Article 26). The major Article 23 grounds are that:

- the judgment etc is manifestly contrary to the public policy of the Member State in which recognition is sought;
- the judgment was given (except in cases of urgency) without the child being given the opportunity to be heard, in violation of the fundamental principles of procedure of the Member State in which recognition is sought;
- the judgment was given in default of appearance if the person in default was not served or not served in sufficient time, with the document that instituted the proceedings and in such a way as to enable the person to arrange for his defence unless it is determined that such person has accepted the judgment unequivocally;
- on the request of any person claiming that the judgment infringes his or her parental responsibility,

¹³⁴ Article 12(4) permits jurisdiction to be taken even if the child is habitually resident and physically present in a State outside the EU, see the English Supreme Court decision, *Re I (A Child)* (*Contact Application: Jurisdiction*) [2009] UKSC10, [2009] 3 WLR 1299.

¹³⁵ Cf Articles 11 and 12 of the 1996 Convention. Unlike Article 11 of the 1996 Convention, Article 20 of the Regulation does not provide for extraterritorial effect of such measures but this is a matter that has been brought before the ECJ, see Preliminary reference C-256/09, *Parrueker*.

if it was given without such person being given the opportunity to be heard, or

- the judgment is irreconcilable with a later judgment given in the Member State in which recognition is sought, another Member State or in the Non-Member State of the child's habitual residence.¹³⁶

Save in the instances concerning access and child abduction (discussed below) enforcement of recognised orders is not automatic but instead requires a separate application (or '*exequatur*'). By Article 28(1) an enforceable judgment on the exercise of parental responsibility made in one Member State can be declared enforceable in another Member State upon the application of any interested party. However, Article 28(2) makes special provision for the United Kingdom inasmuch as judgments only become enforceable within the United Kingdom when, upon application (again by any interested party), they have been registered for enforcement.

The enforcement procedure is that governed by the law of the enforcing Member State (Article 30) but there is a general enjoiner that courts give their decision without delay (Article 31(1)). It is permitted to refuse enforcement but only upon the grounds provided for by Article 23 (i.e. the same as those for refusal of recognition) (Article 31(2)). In no circumstances may a judgment be reviewed as to its substance (Article 31(3)).

III. The Particular Application of the Recognition to Access¹³⁷

An important consequence of relocation is the impact it has upon the children's contact with or access to the left-behind parent. It will, of course, frequently be the case that following relocation the child(ren) live at a much greater distance from the left-behind parent so that access will become more difficult and expensive. That is one reason why a contact order needs to be recognised in the relocation State but there are two other reasons, namely, the court of origin is in the best position to determine what are the child's best interests concerning continuing access and, secondly, if a court knows that the order may not be respected, it might be more reluctant to permit relocation in the first place.

It also needs to be appreciated that following relocation the child's habitual residence can change quickly, giving the relocation court full jurisdiction. This again supports the need to respect the original access order such that it is not changed willy-nilly. Respecting the original access order will preserve continuity for the child, discourage relocating parents from seeking to take advantage of

¹³⁶ In this latter case the judgment must fulfil the conditions necessary for its recognition in the Member State in which recognition is sought. This is the second provision that affects non-Member States. See also fn 135 above.

¹³⁷ For a detailed discussion of the impact of international instruments in general and the Revised Brussels II Regulation in particular, see N Lowe 'Regulating Cross-Border Access to Children' in *Perspektiven des Familienrechts. Festschrift für Dieter Schwab* (Gieseking Verlag, 2005) 1153-1188.

the change of jurisdiction to upset the court of origin's carefully considered order made in the best interests of the child, and thereby encourage voluntary settlements between the parties since the left-behind parent will be secure in the knowledge that the agreed arrangements will not simply be undone at the earliest opportunity.

In short, there is a case for providing special rules for dealing with access and that is what the Regulation does.¹³⁸ In the first place Article 9 preserves, in the case of *lawful* relocations, the court of origin's continued jurisdiction to modify its access judgment for three months following the move, notwithstanding that the child has become habitually resident in the relocated Member State.

This is a useful provision and goes some way towards preserving continuity. But it is a limited provision. It only vests a modifying power. There must be a pre-existing court judgment (*i.e.* there is no equivalent jurisdiction to modify *agreements*). The provision only applies for a three month period dating from the child's physical removal (*i.e.* not following the acquisition of a new habitual residence). This in itself will require the court of origin to have a fast-track procedure to hear an application in time. The holder of the access rights must still be habitually resident in the State of Origin and must not have accepted the jurisdiction of the new habitual residence state by unequivocally participating in proceedings there. In any event Article 9 does not prevent the court of the new habitual residence from dealing with other issues, including, given that the court of origin's prolonged jurisdiction is only to modify access, jurisdiction to *end* access.

The narrowness of Article 9 is to some extent mitigated by Article 41 which provides that:

'rights of access... granted in an enforceable judgment [which by Article 46 includes enforceable agreements] given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of Origin...'

In other words, access orders are immediately enforceable without the need for an *exequatur*,¹³⁹ nor is it possible to oppose recognition or enforcement. The only requirement is there must be a valid certificate issued in the Member State of Origin.

¹³⁸ These provisions dealing with access are based upon a French initiative see, OJ 2000 C234/7. It might be noted that since, as originally conceived, the scope of the French proposal was to be limited to judgments granting rights of access in proceedings caught by the original Brussels II Regulation and would have been by way of derogation from Article 21, the proposed Regulation was dubbed 'Brussels IIA' or 'II Bis'.

¹³⁹ But holders of parental responsibility are nevertheless still free to seek recognition and enforcement by applying for *exequatur*, see Article 40(2).

By Article 41(2) the judge of origin should only issue a certificate where all the parties and the child (unless considered to be inappropriate having regard to age or degree of maturity) have been given the opportunity to be heard. In the case of a judgment given in default, the person defaulting must have been served with the document instituting proceedings in due time to arrange his or her defence or, if not, it is nevertheless established that he or she accepted the decision unequivocally. If the rights of access involve a cross-border situation at the time of the delivery of the judgment, the certificate must be issued *ex officio* when the judgment becomes enforceable. If the situation subsequently acquires a cross-border character, the certificate must be issued upon the request of one of the parties (Article 41(3)). There can be no appeal against the issuing of a certificate (though in cases of error it is permissible to seek rectification before the judge of origin) (Article 43).

Although there is no power to review an access judgment as to its substance, the *enforcing* court can nevertheless make 'practical arrangements for organising the exercise of rights of access, if the necessary arrangements have not or have not sufficiently been made in the judgment delivered by the courts of the Member State having jurisdiction as to the substance of the matter and *provided the essential elements of this judgment are respected*' (Article 48). There can be legitimate debate of the import of the qualification (highlighted) of the modifying powers. Will it, for example, preclude altering the place and frequency of access?¹⁴⁰

IV. The Particular Application of the Regulation to Child Abduction

Hitherto, we have been concerned with lawful relocation issues but another aspect of the issue is that concerned with unlawful relocations or child abduction as it is commonly known. The internationally accepted basic premise is that parental child abduction is wrong since the sudden disruption is likely to be harmful to the child.¹⁴¹ To this end the international community has generally tried to deter abduction principally through the 1980 Hague Abduction Convention, the basic aim of which¹⁴² is to secure the prompt return of children wrongfully removed to or retained in any Contracting State and to secure effective respect for access rights. But another method is to prevent forum shopping by adopting a common set of jurisdictional rules and thereby preventing the abductor gaining any advantage by the abduction.

¹⁴⁰ See the debate in the English courts of the meaning of a similar power under Article 11(2) of the 1980 European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children in *Re A (Foreign Access Order: Enforcement)* [1996] 1 FLR 561 and *Re G (Foreign Contact Order: Enforcement)* [2003] EWCA Civ 1607, [2004] 1 FLR 378 with the former taking a strict line but the latter adopting a liberal interpretation.

¹⁴¹ See the Preamble to the 1980 Hague Abduction Convention and Articles 11 and 35 of the United Nations Convention on the Rights of the Child 1989.

¹⁴² See Article 1.

The revised Regulation's strategy for dealing with child abduction is first to provide special rules of jurisdiction in such cases and, secondly, to modify the application of the 1980 Hague Abduction Convention and in particular to provide a procedure for what is to happen following a refusal to make a return order following a Hague application.

A. *Prolonging the Court of Origin's Jurisdiction*

Like the 1996 Hague Protection of Children Convention, the revised Regulation provides special jurisdictional rules in cases of wrongful removals or retentions principally designed to prevent a court of the foreign State gaining jurisdiction simply upon international child abduction.

Under Article 10 (which is modelled on Article 7 of the 1996 Protection Convention) in the case of wrongful removals or retentions (defined by Article 2(11)) the court of the jurisdiction of the child's former habitual residence *retains* jurisdiction until the child acquires a new habitual residence in another Member State **and** either:

- (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; **or**
- (b) the child has resided in the second Member State for at least one year after the holders of rights of custody have or should have had knowledge of the child's whereabouts **and** the child is settled in his or her new environment **and** *either* no request for a return has been lodged (or has been withdrawn) in that period, or the case has been closed pursuant to Article 11(7) (discussed below) or a custody judgment not entailing the child's return has been made in the State of the child's former habitual residence.

B. *Modifying the Application of the 1980 Hague Abduction Convention*

Whereas Article 10 essentially adopts Article 7 of the 1996 Convention, the Regulation breaks entirely new ground in its modification of the application of the 1980 Hague Abduction Convention, which it does through Article 11.

Although, as mentioned at the beginning, the Regulation takes precedence over the 1980 Hague Abduction Convention, it does not thereby abandon the Convention. Instead, the Article first dictates how Member States should operate the Convention, namely to ensure that both the child and the applicant are given the opportunity to be heard; not to refuse a return under Article 13 *b*) of the Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return; and to issue a judgment within six weeks of the application being launched. In addition, it governs the position following a refusal to return and it is upon these innovative provisions that we will now concentrate.

Article 11(6) provides that following a court refusal to make a return *under Article 13¹⁴³* of the 1980 Abduction Convention it:

"must immediately... transmit a copy of the court order on non-return and of the relevant documents... to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order".

Unless the court of habitual residence is already seised by one of the parties, then according to Article 11(7):

"the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child".

If no submissions are received by the court within this three month time limit the case must be closed. However, if proceedings are brought (for which no time limit is prescribed) and an adjudication made requiring the child be returned then such an order is *automatically* enforceable, that is, "without the need for a declaration of enforceability and without any possibility of opposing its recognition" simply upon the issue of a certificate by the judge of origin (see Articles 11(8), 40(1)(b) and 42).

These provisions aim to:

- (a) prevent the court of the requested State from assuming jurisdiction following a refusal to return the child; and
- (b) give the parties the opportunity of having determined a 'custody application' on its merits in the child's 'home court'.

Although some have said that this scheme enables the court of the child's habitual residence to 'trump' a non-return order, it seems a reasonable compromise in itself. The 1980 Hague Abduction Convention does not deal with jurisdiction after a refusal to return and it is not unreasonable to vest that jurisdiction in the court of the child's habitual residence. The clear problems of doing so, though, are that the child and abductor will not be present in the adjudicating jurisdiction¹⁴⁴ and that there is a danger of delay in disposing of the

¹⁴³ But not under any other Article, such as Article 12(2) or 20 or even by reason of non compliance with Article 3.

¹⁴⁴ But note, as pointed out by Recital 20, it is possible to hear both the child and the abducting parent in the State where they are staying by using the arrangements laid down in Regulation (EC) No 1206/2001 of 28 May 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJL 174, 27 June 2001, p 1).

'domestic' custody application. In this latter respect it might have been better had provision been made for the expeditious disposal of the merits hearing.

Whether it will become the norm for a Hague non-return order to be trumped by a subsequent merits hearing in the child's home court remains to be seen.¹⁴⁵

V. Some Concluding Remarks

Of course the Revised Regulation plays an important role in dealing with relocation issues within the EU but it may be of interest to the wider global community inasmuch as it employs some novel approaches which might be employed in any future international instrument dealing with the issue.

In this respect attention is drawn to the following:

- The Regulation's application to agreements as well as court orders.
- Its preservation of the court of origin's jurisdiction to modify access orders for three months following a lawful move to another jurisdiction and the acquisition of an habitual residence there. In this respect though the period is surely too short and maybe the appropriate time should be six months.
- Its fast-track enforcement of access orders abroad, although it has been suggested¹⁴⁶ that some provision be introduced to refuse recognition of an access order of two or more years' standing.
- Its creation of an obligation to dispose of return applications made under the 1980 Hague Abduction Convention within six weeks.
- Its requirement that the court refusing to make a return order in Hague Abduction proceedings notify the child's 'home' court, which must then notify the parties of the right to institute full-blown custody proceedings and the subsequent automatic enforcement of any order requiring the child's return made in those domestic court proceedings.

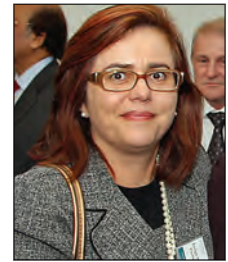
¹⁴⁵ For an example of a Maltese non-return order to be trumped by a subsequent English domestic order, see *Re A (Custody Decision After Maltese Non-Return Order)* [2006] EWHC 3397 (Fam), [2007] 1 FLR 1923. For an example of an English non-return order being trumped by a Polish order, see *Re F (Abduction: Refusal To Return)* [2009] EWCA Civ 416, [2009] 2 FLR 1023. Cf *Re A, HA v MB (Brussels II Revised: Article 11(7) Application)* [2007] EWHC 2016 (Fam), [2008] 1 FLR 289 in which an English court did not ask for the child's return following a French non-return order – upon the father pursuing access rather than custody in the English proceedings.

¹⁴⁶ See the discussion by Lowe, *op cit* fn 137, at 1187.

THE INTER-AMERICAN CONVENTION AND ITS RELEVANCE TO THE ISSUE OF RELOCATION¹⁴⁷

The Honorable Mônica Jacqueline SIFUENTES
PACHECO DE MEDEIROS

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1. Introduction

The Inter-American Convention on the International Return of Children, also called the Montevideo Convention or Inter-American Convention, has the same purpose as the 1980 Hague Convention: the immediate return of the children habitually resident in one State Party who have been wrongfully removed to or retained in another State Party of the Convention. It also seeks to secure enforcement of visitation and custody rights among its members¹⁴⁸.

The Convention was adopted in Montevideo, Uruguay on 15 July 1989, but only entered into force on 4 November 1994. Since then, it has had 16 accessions and it is in force in almost all the States of South and Central America. In North America, only Mexico is a Party to this Convention. The United States of America, Canada, Chile, the Guyana's and Suriname, and other countries in Central America, have not yet joined the Inter-American Convention.

The countries that have acceded until this moment are: Antigua and Barbuda, Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Haiti, Mexico, Nicaragua, Paraguay, Peru, Uruguay and Venezuela.

Most of these countries are also Parties to the 1980 Hague Convention, and this fact gives rise, at least, to some relevant issues: what are the relevant points of the Inter-American Convention? Has it brought some advantages to the countries that have ratified it, in relation to the Hague Convention? For the countries that have joined both Conventions, which one should prevail?

These are questions that I would like to present to you, in a panoramic view, considering the short period of time available.

2. Relevant points of the Inter-American Convention

There are many more similarities than differences between the 1980 Hague Convention and the

¹⁴⁷ Paper presented at the *International Judicial Conference on Cross-Border Family Relocation*. Washington DC, March, 23-25, 2010.

¹⁴⁸ Article 1 (scope): *The purpose of this Convention is to secure the prompt return of children habitually resident in one State Party who have been wrongfully removed from any State to a State Party or who, having been lawfully removed, have been wrongfully retained. This Convention further seeks to secure enforcement of visitation and custody rights of parties entitled to them.*

Inter-American Convention. For example, both Conventions establish the age of sixteen as a limit to their application, and provide for the responsibility of the Central Authorities in each State Party to carry out certain functions. In fact, the Hague Convention, adopted in 1980, was the document that inspired and served as a model for the Inter-American Convention, concluded nine years later – in 1989 – which aimed at the unity and exchange of experiences among countries of the whole American continent. But there are points on which it is appropriate to make some observations.

First of all, it is necessary to draw attention to the title of the Convention itself: the Inter-American Convention is about the “international return of children”. The expression “child abduction” is not mentioned in it. It appears as though the Commission responsible for drafting this Convention considered that the term “abduction” had criminal meaning¹⁴⁹. Therefore, the decision to eliminate that expression from the title would make it unnecessary to establish that the Convention dealt with the civil aspects of the problem. Although this concern would be justifiable, on the other hand, it should be agreed that the simple expression “international return of children” in itself does not say what this return is or when, how and where it should happen.

Furthermore, what is stated in Article 26 of the Convention sounds somewhat contradictory: *“This Convention shall not bar the competent authorities from ordering the child’s immediate return when its removal or retention is a criminal offence”*. What will be considered a “criminal offence” will depend on the domestic law, and this is a point that can always bring some difficulties and raise the question of when the Convention is applicable or when it is not in a specific country. It is also questionable whether it is necessary to have a criminal conviction or a *res judicata* in relation to the abductor.

Article 26 gave rise to an expressed reservation by the delegation of Panama. They considered it contradictory to the “spirit of the Convention”, which was limited to regulating the civil aspects of the return. Also it breached the traditional principle according to which the definition of the offence should be subject to the *lex commissi loci delicti* and to the guarantee of the due process of law¹⁵⁰.

The 1980 Hague Convention discourages any reference to criminal law, which has proved to be the best choice.

Unlike the Hague Convention, the Inter-American Convention sets out the jurisdiction of various authorities to consider a petition for the child’s return in the case of an emergency. Article 6 states the prior jurisdiction of the judicial or administrative authorities

of the State Party in which the child habitually resided immediately before the removal or retention. Nevertheless, in urgent cases, *the applicant may choose, instead, to file a request for the child’s return directly with authorities of the State Party in whose territory the wrongfully removed or retained child is or is thought to be when the request is made, or with the authorities of the State Party in which the wrongful act giving rise to the request took place.*¹⁵¹

In other words, if a party resident in Brazil has knowledge that his/her son or daughter was removed, without his/her consent, to Argentina, for instance, he/she could issue a request directly to the Central Authority in Argentina, instead of filing a petition to the Brazilian Central Authority. However, this is only possible in cases of urgency, in order to prevent the abductor’s escape with the children from the country where they currently are located. Perhaps this possibility would fit into the terms of Article 8 of the 1980 Hague Convention¹⁵², but the Inter-American Convention is more specific about the terms of this alternative jurisdiction.

The Inter-American Convention, like the 1980 Hague Convention, allows a judge to refuse an order for the child’s return when there is a risk of exposing the child to physical or mental harm. It also provides that if the child is mature enough, he/she should be heard in the request for the return (Art.11). However, the Inter-American Convention was more careful than the Hague Convention, by adding to its Article 12.2 that the authorities should be more cautious when considering the reasons provided by the party opposed to the request¹⁵³.

Unlike the Hague Convention, which provides that the petition for the return of the child has to be made through the Central Authorities or directly to the Court, the Inter-American Convention established three ways in which the party can make the request for the return: a) by a rogatory letter; b) by filing a request with a Central Authority; or c) directly, or through diplomatic or consular channels (Art. 8). There is no doubt this is somewhat retrogressive. Direct international legal cooperation avoids the use of rogatory letters, which are considered obsolete and outdated. The current way has been considered successful, given its speed and use of non-formal resolution of these cases.

¹⁵¹ Inter-American Convention, Article 6.2.

¹⁵² Article 8 of the 1980 Hague Convention: *“Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child”*.

¹⁵³ Article 12.2: *“The judicial or administrative authorities shall assess the circumstances and the evidence furnished by the opposing party to support its objections to the child’s return, shall ascertain the applicable law and judicial or administrative precedents of the State of the child’s habitual residence, and, if necessary, shall request assistance from Central Authorities, diplomatic agents or consular officers of the States Parties”*.

¹⁴⁹ FERNANDEZ ARROYO, Diego P. Convención Interamericana sobre Restitución Internacional de Menores de 15 de julio de 1989. *Revista de Informação Legislativa*, Brasília, a. 28, n. 111, jul./set. 1991, p. 147.

¹⁵⁰ *Ibid.*, p. 147.

3. Advantages of the Inter-American Convention

There are some very positive points in the Inter-American Convention that perhaps could be considered at the next meeting of the Special Commission's review of the 1980 Hague Convention.

The first one concerns Article 10.2. There is no similar article in the 1980 Hague Convention. The article states that if the return of the child is not obtained voluntarily, *"the judicial, or administrative authorities, after verifying compliance with Article 9, shall forthwith meet with the child and take such measures to provide for its temporary custody or care as the circumstances may dictate"*.

Actually, there are cases where the temporary custody or other child care measure is needed and often the administrative or judicial authorities, who cannot decide on the merits of rights of custody¹⁵⁴, find themselves impeded from taking such action. In Brazil there have been cases where the judge, verifying that a child's abductor suffered from abductor psychological disorders or alcoholism, determined on an exceptional basis to give custody to a close relative while deciding on the return of the child. The Bill that will regulate the implementation of the Hague Convention in Brazil includes an article which stipulates that in the course of the return proceedings, the judge may decide on the temporary exercise of rights of custody and access.

It is hoped, thereby, to give legal support to this decision, which some judges have given in an emergency, but that others may feel inhibited to grant, in face of the absence of legal provisions.

Article 12 of the Inter-American Convention brings an innovation: it sets deadlines for the submission of objections to the request for return (8 days) and for authorities to decide the case after hearing the objections (60 days). Another good move was to fix the date for the immediate return of the child, if he/she is missing¹⁵⁵. The Hague Convention provides in Article 12.1 that –

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before

the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

The Inter-American Convention, in turn, adds that if the child's whereabouts are unknown, this period will begin from the date of his/her location (Art. 14). What happens in practice is that as long as the child is not located, the administrative or legal proceedings for his/her return do not continue.

In Brazil, the administrative authorities have understood that the elapsed time would be counted from the date of abduction or wrongful retention until the formulation of the application of international co-operation with the Brazilian Central Authority. In this case, the later location of the child would not have much relevance concerning the time in question. However, there are judges who understand that this one-year limitation is calculated from the removal until the beginning of the lawsuit. In this case, if there is delay in locating the child and therefore delay in starting the lawsuit, the applicant will clearly be disadvantaged.¹⁵⁶

4. Prevalence of the Inter-American Convention

Article 34 of the Inter-American Convention states that it should prevail over the 1980 Hague Convention, where its members have ratified both Conventions. It also establishes that *States Parties may enter into bilateral agreements to give priority to the application of the Hague Convention*. Nevertheless, in practice, at least with regard to Brazil, this prevalence has not been very relevant and there's no news that a bilateral agreement has been made for this purpose. In Brazil it has been applied only in cases sent by countries that are not Parties to the Hague Convention or that have not yet accepted Brazil's accession. In relation to the other countries, which are not members of the Inter-American Convention, or are members of both Conventions, the cases have been examined in light of the 1980 Hague Convention.

¹⁵⁴ 1980 Hague Convention, Article 16.

¹⁵⁵ DOLINGER, Jacob. *Direito Internacional Privado – a criança no direito internacional*. Rio de Janeiro: Renovar, 2003, p. 275.

¹⁵⁶ See BEAUMONT, Paul. R. & McLEAVY, Peter E. *The Hague Convention on International Child Abduction*. New York: Oxford University Press, 1999, p. 205 – about US case, *Wojcik v. Wojcik*.

RELOCATION AND THE 1980 AND 1996 HAGUE CONVENTIONS

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I am going to start with a general proposition that the 1996 Hague Convention combined with the 1980 Hague Convention provides at the global level a framework for cross-border legal co-operation on relocation issues. At the moment it is the only global framework available.

I will start with the 1980 Hague Convention. The Convention now has 82 States Parties and Morocco was the most recent to come on board. You may like to know that a number of other States are considering coming into the Convention, including at the moment the Russian Federation, Japan, Korea, Singapore, India and, just before the New Year, the Egyptian authorities announced that they were establishing a committee to consider whether or not to implement the Convention. In relation to relocation, the Convention provides the primary remedy at the international level to address unlawful relocations. And that remedy is the order for the return of the child. The extent to which the Convention can perform that particular role is related to the definition of custody rights, breach of which triggers the return mechanism. In other words, the more limited the definition of custody rights accepted in Contracting States, the more limited the range of relocation or unlawful relocation cases that the Convention can cover. The one other provision I want to remind you about in relation to the 1980 Hague Convention is Article 21, which provides for applications for organising or securing the effective exercise of rights of access. In theory that should be able to help ensure that, when access provisions are attached to a relocation order, they will be respected. But, as I think many of you know, Article 21 has always been regarded as deficient for a number of reasons. One is that it does not provide directly for the recognition or enforcement of foreign contact or access orders. And the other problem is that the responsibilities which Central Authorities have under Article 21 are rather ill-defined. This brings us to the 1996 Hague Convention which provides a very helpful supplement to the 1980 Convention in relation to relocation cases.

At the moment there are 17 States Parties to the 1996 Hague Convention. There are a further 18 States from within the European Union that have signed the Convention, and are expected jointly to ratify the Convention during the course of this year. It was hoped

that this would happen by June of this year, but that probably will not be the case. According to the best information we have, it should happen during the course of the year. Many other States are in the process of considering implementation of the 1996 Convention, including some of those represented here, and the United States is one of those. I should also point out that the 1996 Convention has had other influences. Nigel Lowe has talked about the Brussels II *bis* Regulation, and I think he would agree if I described the 1996 Convention in family law terms as the birth mother of the European Regulation, because the European Regulation was developed after and on the basis of the 1996 Convention. In particular, the Regulation adopts the basic jurisdictional standards of the 1996 Convention. The Regulation applies in a case where a child is habitually resident in one of the European Union States, so that if a case comes before a European Court that involves a child habitually resident outside the European Union, once the 1996 Hague Convention comes into operation within all the European Union States it will be the Hague Convention that will be applied.

What are the 1996 Hague Convention provisions relevant to relocation?

First, general jurisdiction to, among other things, make relocation orders is in the courts of the country in which the child is habitually resident. And indeed the law applicable under the 1996 Hague Convention is the law of that State, i.e. the law of the forum. There is some flexibility in the Convention allowing application of foreign law where it is in the interests of the child to do so, but for the most part the basic rule is that forum law applies.

Except in cases of wrongful removal or retention, in other words except in cases of abduction, jurisdiction changes as the child's habitual residence changes. Therefore, there is no continuing home State jurisdiction as is the case with the U.S. Uniform Child Custody Jurisdiction and Enforcement Act. Various efforts were made during the negotiations to embody within the Convention at least some limited continuing jurisdiction, but those efforts did not succeed and the position is that, as soon as the child's habitual residence changes, jurisdiction changes. In relocation cases that can happen quite quickly. If the relocating parent and the child have made advance preparations for their move to the new jurisdiction, they may become settled very quickly. Why was this approach taken? The broad view was that at the international level, as opposed to the interstate level, it would be unrealistic to maintain general jurisdiction to take measures of protection in respect of children in a country in which the child no longer resides. In other words, it follows the basic idea that the courts of the habitual residence are generally best placed to determine the best interests of the child in a particular case.

* Editor's note: this speech has been transcribed from the recording of proceedings and edited at the Permanent Bureau of the Hague Conference on Private International Law

Does this mean that the order that has been made by the relocating judge is worth nothing when habitual residence changes? The answer is no. First of all, the measures that are taken in the State of origin, which at the time was the State of the child's habitual residence, will be recognised by operation of law in all other Contracting States, including the State of destination if that is also a Contracting State. The measures, including the provisions concerning relocation, will remain in force even if habitual residence changes, and will remain enforceable until modified, replaced or terminated by an authority in the child's new habitual residence. So in the absence of a further application to the Court by the relocating parent, those original conditions of relocation remain in force. The measures which are declared enforceable in the State of destination are to be enforced as if they have been taken by the authorities in that State. Again, in the case of relocation, this means that the order made in the home State is entitled to be treated as if it were an order made in the State of destination. In that State it has to be given respect, and I think it follows, although the Convention does not say this, that a Judge in the State of destination should only modify the order in circumstances which would justify modification of a domestic order.

There is a provision which allows for advance recognition of the relocation order and its contact conditions. It is sometimes important to have an assurance that the relocation order and its conditions will be respected in the country of destination before relocation occurs. This provision for advance recognition, which to some extent makes redundant mirror orders, is a different way of ensuring in advance that the conditions set by the relocation Judge will be respected in the new jurisdiction.

Article 8 deals with a possible transfer of jurisdiction. This allows an authority (which could include a court dealing with a relocation application) exceptionally to consider the possibility of a transfer of jurisdiction to an authority in another State on the basis that it would be better placed in the particular case to assess the best interests of the child. This could happen, for example, where the application is for relocation to a country with

which the child already has a substantial connection or to a country of which the child is a national. The Article also provides in paragraph 3 that the authorities (e.g. courts) concerned "may proceed to an exchange of views". It will be interesting to see what use is made of this explicit authorisation for direction communication between Judges or other authorities. It is obvious that in relocation cases there will often be matters on which an exchange of views could be valuable – for example concerning the practicability and enforceability of a relocation order and contact conditions in the country of destination.

In the case of issues surrounding "the effective exercise of rights of access", Article 35 provides a further basis for co-operation, and possibly direct communication, between judges in the two jurisdictions concerned in a relocation case. Paragraph 1 allows competent authorities to request assistance from authorities of another Contracting State in the implementation of measures of protection, especially in securing "rights of access" and "the right to maintain direct contacts on a regular basis".

Article 35, paragraph 2, provides a specific procedure which could be applied in a case where, following relocation, the custodial parent calls into question the suitability of the "left-behind" parent to exercise access or questions the conditions under which is to be exercised. The "left-behind" parent may request the authorities of his or her State of residence to gather information and make a finding on his or her suitability. This information and finding, while not binding the authorities in the State of relocation, must be admitted and considered by such authorities.

By way of summary, the 1996 Convention, though not providing for a continuing home State jurisdiction, seeks to ensure that proper respect is given to the orders for relocation and the conditions attached to them made in the original home State. It provides a basis for co-operation between Central Authorities and between Judges in finding the right balance between respect for the initial relocation order and the need to respond to changes in the circumstances of the child's life.

6. MEDIATION AND RELOCATION

THE USE OF MEDIATION IN RELOCATION CASES

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International parental child abduction is a prevalent phenomenon that has aroused the anxious interest of most national governments. It usually arises out of a complex and extreme breakdown in the relationship between parents and frequently causes acute emotional distress to both parents involved and, most importantly, to the abducted children.

Year on year, reunite continues to record an increase in the number of abduction cases reported to our advice line. In 2009 we recorded 396 cases involving 574 children, which represents a 25% increase on the previous year. Of these, 216 cases involving 304 children were Hague States, 179 cases involving 268 children were non-Hague States, and in 1 case the country was unknown. When considering relocation cases, in 2009 we recorded 142 new cases involving 242 children, which represents a 16% increase from the previous year. Of these cases, 106 involving 168 children were Hague States, and 36 involving 74 children were non-Hague States.

In 2009 reunite recorded 95 cases of return involving 120 children, which represents a 3% increase from the previous year. Of these, 49 cases involving 61 children were Hague States, and 46 cases involving 59 children were non-Hague States.

In total, the reunite advice line dealt with 7,276 calls.

Since 2002 reunite has been offering a mediation service in cases of cross-border family disputes involving children, where cross-border is defined as where parents have, or are about to have, their normal residences in different countries. Typically we offer mediation in cases of international parental child abduction, prevention of abduction, contact across international borders, and leave to remove a child from one legal jurisdiction. The mediation focuses on the best interests of the child, ensuring that the child continues to have a positive relationship with both parents and their extended family. To date we have mediated in approximately 100 cases, the majority of which have involved the 1980 Hague Convention, but we are now mediating in an increasing number of non-Hague Convention cases involving countries such as Egypt, Pakistan, Algeria, Dubai and India.

When the court is asked to consider a relocation case, one of the important elements that should be considered is how the child is to maintain contact

with the left-behind parent and their extended family members. Unfortunately, there is often insufficient time within the court process to consider the practical issues surrounding the long-term contact between the child and left-behind parent and there is no time for the parents to discuss or share the effects of the child's relocation. From research recently undertaken by reunite into relocation, the left-behind parent often described the relocation as akin to a bereavement. This is in sharp contrast to the relocating parent as they were either returning home or starting a new chapter within their life. Due to the imbalance between the parents' feelings, and the lack of time afforded to considering how the left-behind parent and child are going to maintain a close and positive relationship, reunite believes that the parents should attend specialist mediation prior to the relocation being granted by the court. If the mediation leads to a Memorandum of Understanding between the parents, then it is necessary that the Memorandum should be included within the Consent Order, if granted, and registered in the new State of habitual residence prior to the child's relocation.

By empowering the parents in mediation, and enabling them to own their conflict, a balance can be developed between the parents so they can discuss and agree how the contact is going to work for the child. From the history of reunite's mediation service, it has been proven that agreements reached in mediation have a better chance of working than those ordered by the Court and without the input of the parents.

From my experience of mediating in cross-cultural cases, and from the feedback we have received from parents, the only cultural concern raised was in two cases involving Egypt. In both cases one of the parents did not want an Egyptian mediator involved in the process due to their concerns regarding confidentiality. The confidentiality policy and procedures were reaffirmed by the mediation service, as was the code of practice to which the mediators were working, however the parents still refused to have an Egyptian mediator present and so the cases were mediated with a British mediator. From feedback received from parents who participate in mediation, the most important consideration for them is the professionalism, neutrality, confidentiality and expertise of the mediators.

As a mediator, to enable me to mediate in an effective and efficient way, it is vital that I have a strong administrative system to set up the mediation, and provide information to the parents prior to mediation, but it is also vital that I have access to the necessary information that may be needed within the mediation process to ensure the parents are able to make informed decisions.

Mediation is still a relatively new concept in cases of international parental child abduction and it is important that cases mediated are monitored and evaluated to consider the long-term effectiveness of the

successes or failures of the mediated agreements. We also need to have central entry points for these cases so they can be tracked. We need to ensure that there is uniformity in the use of mediation in cross-border family disputes and that information is fed into the Permanent Bureau so it can be cascaded out to the Member States of the Hague Convention.

reunite is to conduct a follow-up study to evaluate and measure the long-term effectiveness of mediation in those cases resolved through our specialist mediation service. Until a study is undertaken to determine the long-term effectiveness of mediation, there is neither the evidence to support the continued development of services focused on mediation in cross-border family disputes, nor the evidence to justify the possible need for the development of a private international law instrument in support of mediation, or indeed evidence which can form the basis for the direction of such an instrument.

We believe that the findings from this study will provide a more fully informed understanding of the long-term value of mediation in such cases and it is hoped that useful conclusions may be developed which may assist in the debate on the future direction of mediation in such cases.

MEDIATING ACROSS CULTURES: CROSS-CULTURAL ISSUES TO CONSIDER IN THE MEDIATION OF INTERNATIONAL CHILD ABDUCTION CASES¹⁵⁷

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Introduction to Cultural Variables in the Process

Mediation has been defined as a form of dispute resolution where a neutral (emphasis added) intervener assesses two or more negotiating parties to identify matters of concern, develop a better understanding of their situation, and, based upon that improved understanding, develop mutually acceptable proposals to resolve those concerns. (Alfini, Press, Sternlight and Stulberg, 2006, p. 1) The mediator facilitates discussion between the disputants (either in joint sessions or separate sessions) and assists them in creating a durable agreement. While many mediators follow this broad goal, the actual mediation process is practiced in a variety of different ways throughout the world and different approaches are utilized.



¹⁵⁷ This short paper is written as a companion piece to a talk delivered at the International Judicial Conference on Cross Border Relocation sponsored by the International Centre for Missing and Exploited Children and the Hague Conference on Private International Law, with the support of the U.S. Department of State. The reader is encouraged to read the resources at the end of this paper for more comprehensive information on this very important topic.

The Impact of Collectivism and Individualism on Mediator Neutrality v. Mediator Involvement in the Dispute

One mediation approach reflects the goal of mediator “neutrality”, referenced above, and the importance of the mediator not being invested in the outcome of the dispute. These mediators are careful to disclose anything that could be perceived as a “conflict of interest” – either in a relationship with one or more of the parties or in the subject matter of the dispute. They are focused primarily on insuring a fair process within which the parties negotiate – but the mediator is not focusing on a particular outcome. Self-determination is a key value in this type of mediation. (Alfini, et al., 2006, p. 420) Sometimes the mediator may give ideas or proposals for the parties to consider – sometimes they do not. In individualistic cultures where the individual's needs prevail over the needs of the group, individual gain and initiative are important, and independent decisions are encouraged, mediator impartiality and neutrality are seen as essential requirements of a mediator.

However, in some cultures, mediators have been chosen specifically because of their existing knowledge of the actual dispute and the mediator may have his or her own personal interest in assisting in the resolution so that a group (tribe, community, church) will all benefit. This concept is a function of collectivism – where individuals are integrated into strong, cohesive in-groups. In collective cultures, there is a sense that a conflict not only impacts the parties involved, but also the community in which they live and/or work. (Hofstede, 2003, p. 50)

The mediator (perhaps a respected authoritative figure known to all the parties) may use group pressure as well as his/her respected position to persuade the parties about the importance of settling the issues and restoring harmony to the larger group. The mediator may actively encourage parties to accept a specific proposal and may have actually come up with the solution. It is important to acknowledge and understand that some cultures prefer non-neutral interveners, especially for personal and private disputes (Kucinski, 2009, p. 581) and in these cultures, neutrality and impartiality are not valued.

Therefore, who is chosen as the mediator may have a significant impact on the success, or lack thereof, of the mediation. If the parties value “neutrality” then the mediators need to carefully check to see if they have any connection to the parties or the dispute – however tangential it may appear. The mediator strives to keep his or her body language equally balanced between the parties, equally validates the needs of both parties, spends comparable time with the parties in separate sessions, does not seek to find commonalities of experience with one of the parties, and creates an environment of equal treatment.

If the parties place more value on a mediator who is known to them, who is respected as a wise advisor, and

who is invested in the outcome of the dispute, it may be important for the mediator to fulfill those needs. The difficulty in meeting that need in international child abduction cases is that the respected and wise advisor is usually not the same person for two people of very different cultures.

Some mediation organizations have tried to balance the need for impartiality with the need for affiliation. While mediators do not have a pre-existing relationship with the parties, they may have more subtle connections in other ways. For example, The German Association of Family Mediation (BAMF) calls for two mediators to work together – one male and one female. One mediator is from each of the respective countries. One mediator has a legal background – the other a mental health background. They have special training in bi-national mediation and share at least one common language. (Zawid, 2008, p. 12)

Although there have been concerns expressed that parties may feel that the mediator from their country will be in favor of an individual from their own country (Zawid, p. 39), it is also very possible that, in providing this type of balance of nationality, culture, psychological and legal backgrounds, gender, and language, the parties may feel a greater sense of comfort and familiarity. This could meet the needs of the party who highly values impartiality (no conflict of interest, no pre-existing relationship) and the party who desires familiarity (commonality of culture etc).

Attendance at Mediation

Many approaches (especially those used in litigated cases) also require that the parties to the dispute attend the mediation. If not present, an absent party may be seen as acting in bad faith. Without the presence of the party at the mediation, the mediator might be worried that the party may not be invested in the outcome or committed to the agreement and the mediator might be concerned about the durability of any agreement reached in mediation.

However, in some cultures, the term “parties” is constraining and restrictive. Sometimes, people who are not parties to the dispute are the ones who come to mediation while the actual party may not be at the mediation. This is especially true when saving face is an issue. Losing face, in the sense of being humiliated, is an expression which penetrated into the English language from the Chinese – the English had no equivalent for it. (Hofstede, p. 61) Face is lost when an individual, whether through his action or that of people closely related to him, fails to meet essential requirements placed upon him by virtue of the social position he occupies. (Ho, 1976, p. 81)

In order to save face, members of the community may resolve a dispute on behalf of the transgressor and allow him or her to still retain their role and/or status within the group by not having to directly face his accuser

or directly account for his own actions. The pressure from the group is more instrumental than any pressure brought to bear from a member of an out-group.

In mediating international child abduction cases, it is also important to acknowledge the additional importance of extended family in collective cultures. The limited definition of family as consisting solely of the parents and the children is a foreign concept to many families who are comprised of extended families (with uncles, aunts and grandparents who may be living in the same house) and who might continue protecting or acting on behalf of an abducting party.

Therefore, it might be entirely appropriate in situations where saving face is an important factor and/or there is an active extended family, to convene a mediation session with other family members present who might be actively involved in the discussions. It may also be appropriate that the actual parent is not present – especially if that parent is concerned about his or her own safety or if domestic violence has been alleged. Initial negotiations regarding the child could be undertaken with other family members. If there is also a power distance within the family, the family member with higher power than the abducting parent may be an effective participant in mediation to place pressure on the abducting parent to follow the agreement. Pressure from within the collective in-group to maintain the durability of the agreement may be a stronger motivator to the abducting parent than international law.

Power Distance

A culture in which there is high power distance has a high regard for authority and obedience. (Hofstede, p. 32) Leaders make authoritarian decisions and there are often hierarchies within families based on gender, age or other cultural factors. If the party perceives the mediator as a person of high power, he/she tends to show deference to the mediator and will usually not disagree with him or her. If the party sees the mediator as a person of lesser power in the high power distance culture, he/she may challenge the mediator’s assumptions or proposals and may not give the mediator much credibility or respect.

A culture in which there is low power distance believes that equality within a society should be maximized, that people should be interdependent, and that there should be less emphasis on obedience to a higher authority. (Hofstede, p. 32) If the party sees the mediator as a person of equal power there will be more of an atmosphere of equality with the mediator, the party and mediator proposals carry the same weight, and there may be a more informal problem solving atmosphere.

In choosing a mediator in international child abduction cases, it is important to consider the power distance values within the two cultures. Are they the same? (i.e., both high power distance cultures or both low power distance cultures), or are they different? (one high power distance and one low power distance). What will be the

communication dynamics at the table based on the same or different perceptions of power distance?

Further, how is the mediator seen – both as an individual and in the role of the mediator? A mediator's power can be acquired through numerous sources including, but not limited to, credentials, status, nationality, affiliation, gender and age. A party might agree with a mediator only because they perceive the mediator as a person of higher power (and therefore would not challenge or disagree with them); however, the party may have no intention of following through with the agreement.

In addition, how do the parents see themselves from a power perspective within their own culture? As referenced above, having someone attend the mediation who has influence over the parent (*i.e.*, higher power distance) might be an effective way to both respect the culture's hierarchical relationships as well as influence the parent's decision-making process and compliance with the agreement.

Different Standards of Fairness

Different cultures have different perceptions on how to determine what is fair.

The legal standard of fairness is based on law, statutes, codes of conduct, nationally or internationally accepted rules and guidelines – all objective criteria that have been established to define what is fair. For cultures in which the legal standard of fairness is the prevailing norm, a mediator may utilize a process known as "reality testing" – *i.e.*, "if you don't resolve this dispute, what are your alternatives if you have to go to court?"

However, different cultures respect different laws. For example, if Shariah or Islamic law is used within a person's culture to resolve family disputes (including child custody) then to try and persuade an abducting parent of the appropriateness or correctness of international law will have no effect as a form of reality testing. In fact, the mediator would likely lose credibility in negotiating a resolution in non-signatory countries if the mediator uses international law as the standard of fairness when there is not strong cultural support for returning an abducted child to a non-Muslim country. (Uhlman, 2004)

Universalism and Particularism

In some cultures, fairness is not determined through objective criteria, such as the law, but what would be culturally appropriate in the specific situation or in the particular relationship. A complicating factor is the cultural concept of universalism and particularism. In collective cultures, which tend to be more particularist, the distinction between "our group" and "other groups" is at the very root of people's consciousnesses and treating one's friends and family better than others is natural. (Hofstede, p. 66) A relationship of trust must be developed before any negotiation is done. This contrasts sharply with the concept of universalism (more prevalent in individualistic cultures) where one should

treat everyone alike, and developing a relationship may not be as integral to reaching a resolution.

If someone is from a particularist culture, they may believe that they should be treated differently under the law because of their station or status and using the law as a form of reality testing may have limited impact in these situations and may be seen as insulting to the particularist person. Someone from a universalistic culture may feel that the particularist is not respectful of the law and judge his or her actions accordingly. It is helpful to understand if a person is disregarding the law because they are deliberately defiant and hold the law in disdain, or whether they do not understand the law, or whether they are a particularist who understands the law but believes, in good faith, that it should not apply to them. Understanding the difference can help the mediator work more effectively with the party by utilizing techniques that are best suited to each of the above specific situations.

High and Low Context

Cultures also differ in how they communicate. High context cultures assume that knowledge of a situation and how to act in that situation is acquired through a built-in expectation of what is customary and ordinary within that culture. There is little use for formalized agreements or lengthy discussions to decide what is appropriate in a given situation – people are assumed to know from experience. (Hall, 1971)

Because the rules are implicit, dealing with parties from a high context culture may be difficult for someone who is from a low context culture in which specific information is abundant, rules and expectations are clearly stated, and speech is direct and to-the-point. However, while a person from a high context culture may be seen as vague and ambivalent by someone from a low context culture, a person from a low context culture may be seen as rude and aggressive by someone from a high context culture.

It is important for mediators dealing with different cultures to understand these complexities, not only because the parties may be different in their context (*i.e.*, one person from a high context culture, the other from a low context culture), but the mediator has his or her own culture communication filter as well. If the mediator is from a low-context culture, he or she may assume that a parent's indirectness signifies that the parent is unsure or hesitant because he/she is not making direct statements. In fact, a parent who is high context may be just as strong in their positions, but stating them in an indirect way.

If a mediator is not familiar with a particular high context culture, co-mediating with someone from the high context culture might reduce some of the misunderstandings that can arise.

Culture and Domestic Violence

One of the greatest debates within the mediation community is whether mediation can be an appropriate

process in disputes involving domestic violence allegations. As domestic violence involves power and control, mediators worry about an imbalance of power that could yield a coerced, unfair agreement or actually endanger the victim and potentially the child. (Alanen, 2008, p. 51) Additionally, the difficulty of accurately assessing the existence of domestic violence because of the reluctance of many victims to discuss the violence due to cultural norms, shame, loss of face, or fear of reprisal – both from the batterer or even the batterer's family – compounds the issue. The topic of mediating when domestic violence is present is complex and beyond the scope of this paper, but the above concerns become even more complicated in international abduction cases where cultural and societal norms can vary, laws regarding domestic violence may be non-existent or unevenly enforced, and support systems for the victim and the children may not exist or may be ineffective.

Conclusion

Cultural sensitivity must be a paramount consideration in international abduction cases. Identity and conflict are often connected, and the culturally fluent mediator does not separate the dynamics of culture from issues of conflict, but focuses on their interrelatedness. (LeBaron, 2003, p. 283) Culture cannot be seen as a compartmentalized unit that can be checked off like a discrete skill or topic, unconnected to other parts of conflict. (LeBaron, p. 285) Understanding whether a culture is primarily individualistic or collective and how it deals with neutrality, being sensitive to the importance (or even potentially the lack of importance) of a party's attendance at mediation, assessing the power distance levels among all participants in the mediation (including the mediator), being aware of a culture's different perspectives of fairness and how it is applied, and being attentive to the use of direct or indirect communication are just a few of the cultural areas that are important to

consider. In developing mediation protocols for dealing with international abduction cases, cultural awareness and understanding will be a key to the effectiveness and the credibility of any program and any mediator.

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Participants in Session at the U.S. Department of State

7. CASE STUDIES ON RELOCATION

THE CASE STUDIES

I. Relocation for economic and other reasons

Sabine (mother) and Michael (father) are the parents of a boy, Jacob (8 years). Sabine, a German citizen, and Michael, a national of the United States of America, met each other 12 years ago in Germany where Michael was stationed as a soldier for some years. They married in 2000 and in 2002 their son, Jacob, was born in Germany. Sabine quit her job as nurse to stay at home with Jacob for some time. In 2003, when Michael's deployment in Germany ended, the family relocated to Utah in the United States. In 2005, by the time Jacob joined the *Kindergarten*, Sabine found a good part-time position as nurse in the local hospital, although not in her field of specialty.

In the following years Sabine and Michael's relationship deteriorated. In 2008 they decided to move into separate apartments in the neighbourhood of Jacob's school and divorced in March 2009. In an arrangement approved by a court in Utah, the parents agreed that the mother should have the sole custody of Jacob and that the father should have the right to contact with Jacob each Friday after school and every second weekend.

Sabine's friends and family in Germany have persuaded her to consider returning to Germany and to apply at her old workplace, a well-known hospital in her German hometown. In February 2010 she receives notice from the hospital offering her an employment with very good conditions, starting on 1 September 2010. Sabine thinks that the timing is ideal; Jacob could finish his second school year in the United States and they could then relocate to Germany during the summer holidays. When Jacob is asked how he would feel about living in Germany, he reacts with excitement and sadness at the same time. He always felt well in Sabine's old hometown, where he spent a part of his summer holidays each year with his grandparents and where he even has several friends. On the other hand the perspective of losing his school friends makes him sad and more importantly he is worried that he might not be able to see his Dad very often. Since the divorce, Michael has tried to see his son once each week, but lately he had less and less time to do so, because of his work commitments and also because he has recently moved to live with a new partner, who is now pregnant. Michael, who has the right to veto the relocation of his son to a place outside his home jurisdiction, is completely against Sabine's idea of moving back to Germany.

In March 2010 Sabine applies to the competent court for approval of her planned relocation with Jacob to Germany.

You are the judge. Assume that the case is being heard in your jurisdiction:

1. What is the test which you would apply in deciding whether to permit relocation?
2. What factors would you take into account in applying that test?
3. Are there any presumptions you would apply or any factors to which you would attach particular weight?
4. What, if any, are the types of conditions (e.g. concerning the father's contact rights) you would set before permitting relocation?
5. What measures, if any, would you take to ensure that those conditions are met?
6. Would it make any difference if the State of relocation was not a Contracting State to the 1980 Hague Child Abduction Convention?
7. Would it make any difference if your State and the State of relocation were Contracting States to the 1996 Hague Child Protection Convention?
8. What measures might you take during the course of proceedings to encourage the parties to reach an amicable settlement?

I. (a) Variation – Previous abduction:

Instead of going to court to request relocation, Sabine takes Jacob to Germany for the Easter holidays, but does not return with the child to the United States. Michael initiates Hague return proceedings and the child is, accompanied by his mother, returned to the United States. Then the mother applies to the US court for relocation.

You are the judge:

1. Will the mother be disqualified from applying for relocation?
2. Does the previous abduction have an influence on your decision on relocation? If yes, in what regard?

II. Recognition, enforcement, access conditions

Hillary (the mother) and Peter (the father) are the parents of a girl, Laura (6 years). Hillary, who is a national of the United Kingdom, met Peter, a Canadian national, in Canada during her internship at a British Columbia law firm. They soon started living together and established their home in British Columbia. Their only child, Laura, was born 6 years ago. Already shortly after their daughter's birth they started to have relationship problems and they finally decided to separate 6 months ago. Hillary wanted to return to her hometown, London, but Peter was completely against her leaving Canada with the child. However, Hillary's relocation to London was approved by the competent Canadian court subject to detailed contact arrangements, according to which the father could (a) speak with his daughter by Skype for one hour every weekend, and (b) have his daughter visit him in British Columbia for two weeks twice a year during the school holidays.

Not long after Hillary's relocation to the United Kingdom, Hillary begins to make difficulties over the contact arrangements. Peter's efforts to contact Laura

by Skype are often frustrated by Hillary. Hillary has now applied to a court in the United Kingdom to change the terms of contact so that Peter would only be allowed supervised access to Laura in the United Kingdom. She claims that Peter lacks the capacity to care for and protect Laura.

You are the judge seized with Hillary's request. Assume that the case is being heard in your jurisdiction:

1. Would you have jurisdiction to hear the case? If so, on what basis?
2. Would the British Columbia decision be entitled to be recognized and could it be enforced in your jurisdiction?
3. In determining the application to vary the conditions of contact, what weight will you attach to the British Columbia decision?
4. Would it affect your consideration if the child were 12 years old?
5. If you had the possibility, would you contact the relevant judge in British Columbia?

III. Relocation or abduction

Anna (mother) and Juan (father) are parents of two girls, Alba and Carmen, aged 7 and 9 years. Anna, a Spanish citizen, had moved from Spain to Venezuela to marry Juan, a national of Venezuela, whom she had met in Spain during her studies. Their two daughters were born in Venezuela in 2001 and 2003. In 2008 the parents' marriage encountered difficulties and in September 2008 the father moved out of the family home. Anna started considering going back to Spain, but was still hoping that the relationship problems with Juan could be overcome. On 2 June 2009 she took the children to Spain with the intention not to return to Venezuela unless the relationship problems with Juan could be overcome. Juan had given his consent to the journey and a return ticket was booked for the beginning of September 2009. Before leaving Venezuela, and after arriving in Spain, Anna took steps to establish a home in Spain for her and her two daughters. The children started school on 9 June 2009. In August Juan contacted Anna, informing her that he wanted the children to return and that he wanted to divorce. Since Anna and her daughters did not return in the beginning of September 2009, Juan filed a return application with the Central Authority under the 1980 Hague Child Abduction Convention.

You are the judge seized:

1. How would you approach this case?
2. Where was the habitual residence of Alba and Carmen in September 2009?

IV. Prevention: Avoiding litigation / promoting agreements

Lucas (father) and Audrey (mother) are parents of a girl, Pauline (10 years) and a boy, Paul (8 years). Audrey and Lucas, both nationals of France, married in 1998

and have ever since lived in France, where their two children were born. Relationship problems led to their divorce in 2004. In agreement with the parents the court gave shared custody of the children to the parents. The children were from that time on living with Audrey; Lucas was visiting them regularly. Even after he had moved to another city in France he saw them at least once a week. In 2006, Audrey met Beat, a Swiss national, during holidays in Switzerland. In 2009 after three years of a long distance relationship Audrey and Beat married. Audrey now wants to relocate to Switzerland with her children as soon as possible to live with her new husband, with whom she is expecting a child. She tells Lucas that she wants to leave in two months. Lucas is against the relocation because he is afraid to lose contact with his children. He calls the French Central Authority under the 1980 Hague Child Abduction Convention for advice because he is afraid that Audrey might leave France without waiting for permission.

Consider the following:

1. Would you grant, on Lucas' application, an interim order prohibiting Audrey from taking the children out of the jurisdiction?
2. Could the problem be solved outside the court?
3. Could a judge seized by the mother regarding the relocation refer the case to mediation?
4. Is the two months' notice Audrey gave to Lucas reasonable?

V. Voice of the child, separate representation

Thomas (father) and Sarah (mother) are parents of a 9 year old boy, Justin. Sarah, a national of New Zealand, met Thomas, a national of Australia, in Sydney, where she was studying law. They established their joint home in Sydney where they married in 2003. Despite serious relationship problems after the birth of their son they continued living together to raise the child. However, in November 2008, things became very difficult and Thomas and Sarah decided to move into separate apartments. Since they could not agree with whom Justin should live, they decided that Justin should live Sundays to Wednesdays with his mother and Thursdays to Saturdays with his father. For Justin this arrangement has been difficult, especially after the father moved to another neighbourhood of Sydney; Justin has to pack his favourite toys, etc. twice a week and regularly is upset about the things forgotten in the other home.

In summer 2009 Sarah loses her job in Sydney which makes her consider returning to New Zealand. A few months later she is accepted for a lucrative part-time position in a New Zealand law firm and she starts preparing for relocation together with Justin. Thomas is shocked when he hears the news and is completely against Sarah and Justin's relocation, but due to his work commitments he is also not able to suggest taking care of Justin all week. The situation escalates and in the following weeks the parents try to exclude each other from access to Justin on various occasions. Justin, who

started his first school year in September 2009, is very confused and suffers from the situation. He knows New Zealand only from a few visits to maternal grandparents and he is very worried about losing his school friends. He cannot imagine living without his father; so if he were to move to New Zealand, he would want his father to come along.

Sarah applies to the competent court for sole custody of Justin and for approval of her relocation with Justin to New Zealand?

You are the judge:

1. Would it be useful to appoint a guardian for the child or to provide for separate representation of the child?
2. Should the child be heard in the proceedings? If yes, what weight should be given to the child's wishes?
3. Would that case be suitable for mediation? If yes, how should the child's voice / wishes be brought into the mediation process?

VI. Relocation and the 1980 Hague Convention

Ignacio and Maya are a married couple living in State Y, which is a Party to the 1980 Hague Convention on Child Abduction; six months ago Maya brought her two children (aged 12 and 6) to State X for a holiday with their grandparents. During the holiday she was persuaded by the grandparents that she should remain in State X. Her marriage has broken down and the opportunities and support for her and the children would be much greater in State X.

A lawyer whom she consulted in State Y told her that it would be useless to apply for permission to relocate in the courts there, that all applications in his experience had been turned down and that, in the one case which had gone to appeal, the appeal court had indicated that it would refuse to allow relocation in any case where this would have an impact on the child's right to maintain contact with the left-behind parent.

On the basis of that advice, Maya decided not to return with the children to State Y. Ignacio then brought proceedings under the 1980 Hague Convention for the return of the two children. Maya has argued in those proceedings that, in view of the impossibility of obtaining a relocation order in State Y, an order for return would be in breach of Article 20 of the 1980 Hague Convention.

1. Consider whether you would accept Maya's defence in this case.
2. Would your decision be different if State Y were not a Party to the 1980 Hague Convention?

BREAK-OUT GROUP REPORTS – GROUP 1

RAPPORTEUR: Professor Linda SILBERMAN*, Martin Lipton, Professor of Law

**New York University,
United States of America**



This is my first opportunity to speak formally, so let me, like many of you, thank the organisers of this Conference. My relationship with the Hague Conference goes back more years than I would like to remember and I really am indebted to them for my own interest in the 1980 Hague Child Abduction Convention, similarly ICMEC and the U.S. State Department with whom I have worked for many years.

Our group took a rather innovative approach to these problems. I would say that we discussed many of the issues that are in all six of the problems, but we did it in a somewhat unusual way and we concentrated and had a very lengthy discussion about Case Study I and then brought in a number of the issues that showed up in some of the other problems.

We began in Case Study I with a discussion about the way to approach a relocation issue. There was an extensive discussion about the desirability of presumptions and what they might add and the alternative option of using a list of factors that might provide guidance on a relocation issue. Among the concerns, of course, was the issue of cost and the desire to be able to have some guidance that might lead to predictability for the parties and reduce the cost factor. There was a general view that relocation was a matter of discretion for judges, and the question really was, how do you balance discretion against either presumptions or factors? The majority view was that it would be helpful if we could identify factors, and there was some discussion of this list of 36 factors. It was thought if we could identify factors that might dictate a result, that would be very helpful for parties. That was the consensus of the group. However, I have to say that there were dissenting minority views that thought, for example, that if there really was a case like the first case where one of the parties had custody and one had access, the custodial parent ought to be able to relocate, and there was a view at some point that factors really were not very helpful. But I think the consensus was in favour of factors and we did try to identify a number of factors.

The first factor identified was the likely impact of the relocation on the left-behind parent and accordingly the impact on the child and the child's relationship with the left-behind parent. There was a view that this factor was tied closely to the historic relationship and indeed the

*Editor's note: this speech has been transcribed from the recording of proceedings and edited at the Permanent Bureau of the Hague Conference on Private International Law

actual relationship of the parents and the child. There were then factors such as the reasons for the move. Were they genuine? Were they legitimate? And then, balancing against that, the reasons that the left-behind parent was objecting. We also had a lengthy discussion about the role of the child in this analysis and, as we talked about the wishes of the child, there was a sense that this was maybe not the best way to put the issue. There was a concern to avoid the child thinking that he/she is making the decision and so we suggested that it was the “*perspective*” of the child that we would want to obtain in some way. There was a discussion about how the perspective of the child would be best obtained and whether it would be best to directly interview the child, or instead have a guardian who would represent the child’s voice, or indeed have the judge talk with the child. I think the conclusion was that different legal systems have integrated this into their judicial systems in various ways and there was therefore not one particular way that this could be done. Another factor was to have at least some idea of the setting to which the child was moving. There was discussion about how, in reality, you could in fact obtain such information, and also ‘reality testing’ of the proposals that were being made.

So that was the general view: that we would try to identify factors as a means of guidance in relocation cases. Examples had been given by Judge Boshier the other day, and I think we reached a conclusion that that was an interesting way of approaching it.

One issue that emerged in our discussion was whether there was a need to act promptly in relocation cases since a suggestion was made that we should act expeditiously. A discussion then ensued about whether, in the context of relocation, there really was any necessity to move promptly. Some of us met Nina Meierding this morning, and one of the observations that she had made was that in relocation cases it was often advantageous to let things simmer down and not to have parties acting or making these kinds of decisions in the heat of the moment. And so, unless there was a particular reason for deciding the matter quickly, for example, somebody had a job offer that had to be accepted, then maybe in fact this was not an issue that should have a high priority that had to be moved very quickly.

We then moved to the kinds of conditions that we might impose on a decision to relocate. I think everyone agreed on the need for access and contact with the left-behind parent and there was a desire to deal with the details of the access. Although I do not think that we had a complete list, we talked about other conditions, such as: support, the cost of travel, various kinds of schedules, issues that may be important in certain circumstances, the kind of school that the child will attend, the suggestion that the child would maintain the language particularly if it was a young child and the need to continue to communicate with the left-behind parent. I think there was a consensus in the group that mediation in a case like this would be very helpful.

We then moved on to talk about concerns regarding the enforcement of any access order that might be made, and various possibilities arose, including registering any agreement reached in both countries. It was noted that in some countries you cannot register the agreement in court; it would have to be registered in the town hall or elsewhere, and if a dispute arose later the agreement might be brought to court.

We also talked about mirror orders, but noted in our group that some countries do not recognise mirror orders. We also noted the potential problem of a court having jurisdiction if the child is not there. We noted in this context the advantages of the 1996 Hague Convention which would enable the enforcement of such access orders, although we were aware that in terms of an access order that was recognised and enforced in the relocated-to State, that State could still modify the order under the 1996 Convention. Indeed, there was a desire to create continuing jurisdiction and we discussed placing a condition on the order such that the relocating party had to seek any modification in the original court.

We discussed that a party who had abducted the child would certainly not be disqualified from seeking relocation after returning to the former country of residence, but it certainly would be another factor that would enter the court’s mind and it would indeed concern the issue of trust and whether agreements that had been made on access would be honoured.

We then moved to the last question in Case Study II, but we talked about it in the context of the first Case Study. If the parties tried to vary the contact order, how might you proceed in terms of dealing with the relevant Judge in the other jurisdiction? And again, I think there was agreement that it would be better if the first court continued jurisdiction. The real inquiry and discussion at this level came about judicial communications and certainly there was a sense that judicial communications would be very useful in requests for modification, but how to implement that was a much harder question. There was some discussion about potential communications with the Network Judges in each of the countries, but there was a concern about how well that would work if the Network Judge was not the one who was actually going to hear the case and modify the order. There was a discussion that many countries would have problems with direct communications among the Judges if there is no authorisation. We understood that under Brussels II *bis* and the 1996 Hague Convention direct communications are authorised and thought that was desirable. So, again, we were endorsing the 1996 Hague Convention. There was a question about which matters should be the subject of direct judicial communications, and it was raised that, on occasion, there is actually confusion and misunderstanding about what an order means, how to interpret a particular order and how to understand particular terms.

There was a lengthy discussion about mediation, and we concluded that it would be desirable to promote

mediation in relocation cases since it can be very useful. There are concerns in some countries about the cost of mediation and it was thought to be very desirable to have legal aid for mediation as well as in litigation.

BREAK-OUT GROUP REPORTS – GROUP 2

RAPPORTEUR: Professor Nigel LOWE*

**Cardiff Law School,
United Kingdom**



I will start with Case Study VI. One of the things that struck our group is that self-help defeats all international regulation. It is therefore important to note that Maya should not have acted unilaterally in this particular case. She should have gone to get proper authorisation to relocate. I think that, as an issue of principle, is a very important point. As an issue of practicality we all know that it doesn't actually work quite that way. But that is an important point to start with.

The majority view in our group on this case was that, if you could establish that there was absolutely no chance that Maya could obtain a relocation order, then that indeed would be a consideration which would be taken into account in any Hague return proceedings. However, we thought this case was a long way short of establishing that: we would require a lot more evidence than was put here to be satisfied that she was unable to obtain a relocation order. However, hypothetically, if we could find a State where it could be convincingly demonstrated that such an order could not be obtained, then we thought that in those countries that had implemented Article 20 (which is supposed to be every country, since there is no power of reservation), this would indeed be a possible Article 20 defence. The United Kingdom however, has not implemented Article 20, so we would be driven into Article 13 b).

This does therefore demonstrate the need to have some sort of commonality on relocation law, particularly in those States which are fellow Hague Convention States. If it was a non-Hague case I think we would find this argument even more compelling because one of the interesting issues we raised was, is it not implicit, if you accept accessions, that you accept whatever law the State brings to the table? Of course that does not arise in non-Convention States. So that justifies in a way being more readily sceptical of the value of another State's law if it was that extreme. But we did actually have a very interesting discussion about what it is that should motivate a State to accept accessions. And it was not quite straightforward because although you could well take into account relocation policy and indeed for some that would be a very important consideration, you have to balance this out with the *quid pro quo*.

* Editor's note: this speech has been transcribed from the recording of proceedings and edited at the Permanent Bureau of the Hague Conference on Private International Law

As far as Case Study V is concerned, we found that our States have quite different policies about whether there would be formal separate representation for the child or not. Some States make it mandatory. In the United Kingdom, almost at the other extreme, in relocation cases it is unlikely that there would be separate representation. If it had been an abduction case it would perhaps be more likely. In Australia, it was said that only in exceptional cases would you have separate representation. So we did not have a common answer to the first part, but we all agreed that there ought to be a voice for the child. It was really a question of how to give the child that voice and it was thought that it would either be through separate representation or through being referred to a specialist who would report the views back to the court.

We agreed that it was a suitable case for mediation. I think we generally took the view that mediation is worth trying in more cases than not, but there was a debate about whether it should be attempted before proceedings, or whether it could continue during proceedings.

Because we went backwards, I will now move on to Case Study IV, and I will end there. This was a question as to whether you would make an interim order to hold the position right at the beginning and I think that there was unanimity that we would preserve the *status quo*. We had quite a lot of discussion about to what extent there were controls on exit from countries, and we found that there were in fact quite varied policies on this. So, for example, the United States of America has no exit controls. The United Kingdom is very easy, of course; we are small, really, and we have quite effective stop notices. We heard that also Canada has a stop list, Australia has a stop list and Brazil has an incredible stop list. If I understood Brazil correctly, you have to get an authorisation which can be registered and everybody can find out about it, and this applies not just to leaving the country but also to internal travel, too. In conclusion, we thought that there ought to be some sort of exit control, but we recognised that there were considerable problems in achieving it.

Is two months' notice adequate? We found that there were jurisdictions where notice was mandatory, and so in that sense there was no discretion at all, and the periods varied from 90 days to 30 days. I do not think there was any shorter or longer period.

We did also have a long discussion about whether we could come up with some checklist of relocation factors and our discussion largely mirrored the first group's discussion on this issue. We discussed that the factors would need to be practical and that there would also need to be recognition of the fact that we are talking about *individual* children and *individual* circumstances. Whilst we would therefore hope that the factors would enhance predictability for parties, it would need to be borne in mind that they would only be a guide and would not provide the answer to each case.

BREAK-OUT GROUP REPORTS – GROUP 3

RAPPORTEUR: Professor Robert G. SPECTOR*

University of Oklahoma Law Center, United States of America



I will try to be brief and I will try not to repeat what Linda Silberman and Nigel Lowe have eloquently stated.

In Case Study I, which we did discuss at great length, at the end of the session we asked how many in the room would be inclined to allow the move, and how many would not be inclined to allow the move. The group split 5 to 5. Now, that is not to say that the case would depend upon the individual inclination of the particular Judge because many in the room felt bound by the law in their jurisdiction, as opposed to what they personally felt about whether the relocation would have been proper or not. However, it still of course raises the question of predictability in this area, which continues to be a problem.

One of the other things that concerned us in this case was that this could be a low income family and so we were terribly concerned about the problem of costs. We discussed that even if you were inclined to allow the move and dealt somehow with the father's access rights, there was still the question as to how this was actually going to be facilitated if the family was of limited means. I think that this issue was of great concern for us, particularly because we did agree that a court should always strive to decide relocation cases with consideration being given to the right of the child to maintain a meaningful relationship with the left-behind parent. A major concern is therefore how that could be done, particularly in low income cases.

We also discussed procedure in this case, and this led us to agree certain recommendations:

1. First, we do agree that some form of notice ought to be required in the context of a relocation case. Opinions differ perhaps on the number of days, but certainly some sort of notice should be required so that people can express their opinion about the proposed relocation. And, of course, that led to a second recommendation.
2. States should ensure that legal procedures are available to enable a request to be made to the competent authority to relocate with a child. The corollary of this is that there should be a right and ability to object to a relocation of the child, having received notice of the same.

We also discussed mirror orders and noted the problem

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in some jurisdictions that, unless the child is actually there, the court might not have jurisdiction to enter the mirror order. Although we noted that under the 1996 Hague Convention and of course in the United States of America under the UCCJEA, you can get advance notice as to whether your child custody determination would be recognised and enforced. Absent that we thought that States should be able to provide a procedural vehicle whereby a mirror order could be obtained without the child actually being there.

We came to the conclusion that there ought not to be any presumptions here and that the focus really ought to be on the best interests of the child.

In Case Study II, we noted first the jurisdictional issue in the case. Most people thought that in this particular case England would have jurisdiction to deal with the mother's attempt to restrict visitation. However, in the United States the matter comes out quite differently because, with British Columbia having just made the decision and with the father continuing to live there and continuing to exercise contact and with substantial evidence in British Columbia, it might be determined that British Columbia would continue to have exclusive jurisdiction in the case. Indeed, if this were a case coming into the United States, the answer would be that a US court would not have jurisdiction unless British Columbia decided that it had lost jurisdiction when the child moved and therefore the United States could go ahead, or unless it was determined that the new country where the child had moved to was a more convenient forum. So, it seems that the jurisdiction issue would be decided differently depending upon where the relocation had taken place.

We did get into a discussion on judicial communication and co-operation at this point, and the question was raised as to whether it would be helpful for the Judge in the second country to talk to the Judge in the first country. There was a general view that, since only six months had passed, perhaps a discussion would not be helpful because all that was likely to be said from British Columbia was, well, this is what I ordered and it was only six months ago.

We did vary the problem a little bit and question whether the response would be different if two years had passed and the mother was now concerned as to whether the father was fit for visitation, and this raised the question of Article 35 of the 1996 Hague Convention. There was some ambivalence around the table as to whether Article 35 would be useful, or whether it would even be practical to utilise the procedure. It was felt that, in any event, the second State should not modify the visitation or access arrangements of the first State unless there really had been a substantial change in circumstances.

With regard to Case Study III, everybody was in agreement that this was an abduction case and that it was not a relocation case.

As regards Case Study IV, we spent a good deal of time discussing how the arrangements on access would be set up. We did say that mediation would be appropriate here, and discussed that many more creative solutions could be reached in the context of mediation, and a broader range of issues could be addressed which may be beyond the power of the court to order. In dealing with the voice of the child, we wished to adopt the language from the 1980 Hague Convention so that, in relocation cases, the child should be heard if he/she is of sufficient age and maturity to express an opinion.

With regard to Case Study VI and the Article 20 defence, most people in the group originally said

that it was not an Article 20 defence. However, it was acknowledged that if all relocation cases from State Y were routinely turned down, there is a question as to whether the mother really does have meaningful access to the court system: she can get into the system but, if the system always comes out the same way, is that meaningful access to the system at all? There was a House of Lords case within the last few years that said that a child should not be returned to a Middle Eastern country because the mother did not have effective access to the court system there. Using that case, it might be possible to make an Article 20 argument here. However, there was some considerable hesitation about this.

8. JUDICIAL NETWORKING AND DIRECT JUDICIAL COMMUNICATIONS

Mr Philippe LORTIE*

**First Secretary,
Hague Conference on Private
International Law**



Thank you very much. The presentation will be divided into two parts. First, I will talk about judicial networking and give you some of the recent news and latest developments in that respect, and then I will address direct judicial communications issues in relation to relocation cases.

With regard to the latest developments and latest news from the Permanent Bureau, first of all I would like to inform you that Ms Eimear Long, who assisted us for almost two years in relation to judicial networking and direct judicial communications, has moved on to pursue an academic career in Dublin. She left the Permanent Bureau in October 2009. A number of you met her during the January 2009 Joint Conference of the European Commission and the Hague Conference. Ms Maja Groff, a dual Canadian / American National, replaced Eimear Long on 1 February 2010. So there was a gap and this probably explained why we were not in a position to actually send you the updated List of Members of the International Hague Judicial Network during the Autumn of 2009. Maja Groff will be assisting me in this area, and also in relation to the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*, the *Hague Convention of 13 January 2000 on the International Protection of Adults*, and also the databases such as INCASTAT and iChild. We are very glad to have Maja Groff back at the Permanent Bureau. She was an intern with us in 2008.

With regard to the consolidation of the International Hague Judicial Network, I would like to give you an idea of how fast the Network is growing. The Network now includes 48 Network Judges from 35 States, compared to 39 Network Judges from 26 States last year in January 2009. During the past year we welcomed new Judges from Costa Rica, Finland, Germany, Israel, Kenya, Nicaragua, South Africa, Spain and Venezuela. The International Hague Network of Judges now includes two members from non-States Parties to the 1980 Hague Convention, which are Gabon and Kenya.

In the coming months the Permanent Bureau will work on the consolidation of the European part of the International Hague Network of Judges in collaboration with The Right Honourable Lord Justice Mathew

* Editor's note: this speech has been transcribed from the recording of proceedings and edited at the Permanent Bureau of the Hague Conference on Private International Law

Thorpe. We have identified more than 12 States in Europe that could, at this point, appoint a member to the Hague Network, and these are States that actually have appointed sitting Judges to the European Judicial Network. And we are very pleased to inform you that we learned recently that France has taken a decision in principle to designate a sitting Judge to the Hague Network and we hope to be able to share more news and give you a name within the coming months. This is a very positive development and could help a number of civil law States actually move into the Hague Network.

A couple of words concerning the consolidation of the List of Members of the Hague Network, continuing the discussion we had in Brussels in 2009 and the ones we had in The Hague in July 2008. With the last update, which we sent last week, we have been asking you to provide us with the official name of your Court and, where applicable, your title when it exists in another language other than English or French. That is to make this information available to nationals in States where the official languages are not English and French. It is very important for Judges to know, within your own State, who you are and in which Court you are sitting with the exact names. With the next update we will ask you to identify the areas of the law for which you can entertain judicial incoming and outgoing communications. This is also a result of our earlier discussions in Brussels. The areas that we have in mind at this point are the 1980 and 1996 Hague Conventions, Brussels II *bis* for members within the European Network, and family law in general. Further, one thing that we may want to discuss here this morning is whether that last catch-all category is sufficient for the purpose of relocation cases because this does not necessarily fit in the other two Conventions, especially if you are not Party to those Conventions.

With regard to the Draft Principles for Judicial Communications which we started to develop and which were the subject of discussions in Brussels in 2009, it is our intention during the coming months to consult with you as a group and on an individual basis with a view to the finalisation of the Draft Principles. In particular, we wish to consult on Principle No 6 concerning legal safeguards. The consultation will be with a view to actually circulating the Draft Principles to States Parties to the 1980 and 1996 Hague Conventions for them to be discussed during the next Special Commission meeting to review the practical operation of the 1980 & 1996 Hague Conventions in mid-2011. So this is where we stand and we have given you some information so that you know what to expect from us. And probably this will be under my signature or sometimes from Maja Groff, who will be putting more detailed questions to you.

If I may, I will now move to the direct judicial communications in the context of relocation. Yesterday we heard on a number of occasions through the hypothetical cases that direct judicial communications should be encouraged in relation to relocation for

several purposes. It could be:

- to establish a relocation order;
- to recognise and enforce a relocation order – that would be either advance recognition or enforcement, or ordinary recognition and enforcement of such a relocation order;
- it could be to replicate a relocation order – that is the ‘mirror order’ as we understand it in common law, but we can use the term ‘replicate’ for those who are not familiar with the mirror order expression; and
- where necessary, and where possible, to modify a relocation order.

So we have actually discussed direct judicial communications in these contexts.

There was a concern raised by a few Judges to the effect that a Judge may not be in a position to entertain direct judicial communications if the Court in his/her State is not seized by one of the parties to the matter. It would be very interesting to hear the views of the different Judges in that respect. My personal view is that where

a party has not seized the Court in the State to which the direct judicial communication is sent, I would think that a Member of the Hague Network could entertain that communication as a general communication, and not a communication on a specific case. That is, you could actually answer questions from the other Judge in a general way without actually making reference to a specific case, i.e., providing information as to what is possible so that one could actually include in the relocation order conditions which could be easily enforced and recognised in the State where the family, the mother and child for example, would relocate to. So these are some of the issues that were actually raised yesterday, and I think that we could actually discuss this morning.

You are the Judges and I am not, so there may be other issues you have in mind that are more complex than others, and that you would like to raise here this morning so we can actually go a little further into the practicalities of direct judicial communications in the context of relocation. Thank you.

9. NOTE FROM THE PERMANENT BUREAU

PARENTAL AUTHORITY AND RELOCATION IN FRENCH LAW

Nicolas SAUVAGE

Legal Officer, Hague Conference
on Private International Law



A. Parental Authority

In French law, the Act of 4 March 2002 on Parental Authority sets down rules which govern both the attribution and exercise of parental authority. As a general rule, parental authority is vested in both the father and mother (Art. 371-1 Civ. Code) and they must exercise it jointly (Art. 372 Civ. Code).¹⁵⁸

The Act of 2002 clarified a fundamental principle of French family law by stating that the separation of parents, as such, has no effect on the attribution and/or the exercise of parental authority (Art. 373-2 Civ. Code, para.1). Only an order of the court can modify this.

Where parents do separate, it is possible, of course, that they will agree on the exercise of parental authority post-separation. If they reach such an agreement, the agreement must be approved by the Family Court.¹⁵⁹ The court may also intervene upon the request of a parent or the public prosecutor ("*ministère public*") to determine the issue. The issue of the exercise of parental authority will include determination of the question as to where the child is to reside.¹⁶⁰ Both legally, and in practice, the courts will support the establishment of 'alternate residence' for the child *i.e.* the child's residence alternating between the mother and father.¹⁶¹

Whilst the joint exercise of parental authority is maintained as a general rule, in *exceptional* cases the

judge may assign the exercise¹⁶² of parental authority to one of the parents only. This will be done where the interests of the child so require (Art. 373-2-1 Civ. Code). When deciding this matter, judges must base their decision on the welfare of the child¹⁶³ and identify serious reasons to apply such an exception¹⁶⁴ *e.g.* alcoholism, violence, risk of abduction, psychological troubles or serious lack of interest in the child¹⁶⁵. However, even in these circumstances, "the exercise of the right of access and lodging may be refused to the other parent only for serious reasons",¹⁶⁶ *i.e.*, a major threat to the child and the absence of alternative solutions. Furthermore, he/she will retain the right and duty to supervise and support the education of the child and he/she must be given notice of any important decision relating to the life of the child including the change of residence as mentioned below.¹⁶⁷

B. Relocation

Child relocation is addressed in French Law in the Act of 4 March 2002 on Parental Authority in the section on the exercise of parental authority by separated parents (from Arts. 373-2 to 375-2-5 Civ. Code). In fact, the Act of 4 March 2002 provided an opportunity for a clearer legal framework to be put in place regarding the relocation of a child of a separated couple by including Article 373-2 in the Civil Code. The Code states that:

"[...] Each of the father and mother shall maintain personal relations with the child and respect the bonds of the latter with the other parent.

*Any change of residence of one of the parents, where it modifies the terms of exercise of parental authority, shall be the subject of a notice to the other parent, previously and in due time. In case of disagreement between them, either parent may refer the matter to the family judge who shall rule according to what the interest of the child requires. The judge shall apportion removal expenses and adapt accordingly the amount of the contribution to the support and education of the child."*¹⁶⁸

judgment convicting them of violence directed to their child (Art. 378) or by the decision of a civil court considering that they obviously endanger the security, health or morality of the child (Art. 378-1). Deprivation of parental authority to protect the child is the most serious decision that can be taken regarding the relationship between a parent and a child since a parent will lose all rights over his or her child as a result. Partial deprivation of parental authority can also be expressly ordered by the same courts.

¹⁶³ See *Cour de cassation*, Chambre civile 1, du 14 novembre 2006, 05-18.116, Inédit.

¹⁶⁴ See *Cour de cassation*, civile, Chambre civile 1, 20 février 2007, 06-14.643, Publié au bulletin.

¹⁶⁵ See a recent example before the *Cour de cassation*, civile, Chambre civile 1, 14 avril 2010, 09-13.686, Inédit.

¹⁶⁶ Art. 373-2-1 Civ. Code, para 2.

¹⁶⁷ Art. 373-2-1 Civ. Code, para. 3.

¹⁶⁸ Translation from the Permanent Bureau

¹⁵⁸ It should be noted that a specific regime applies in relation to the exercise of parental authority where the parents are *unmarried* and where the parentage of one parent is established more than one year after the birth of the child. In this scenario, the parent whose parentage was first established remains alone vested with the exercise of parental authority. The same consequence results from the establishment of the subsequent parentage by judgment (Art. 372, para. 2). However, parental authority may be *exercised* jointly where there has been a joint declaration of the father and mother before the chief clerk of the *tribunal de grande instance* or upon judgment of the family court, where the decision is taken in the best interests of the child (Art. 372, para. 3 of the Civil Code).

¹⁵⁹ Art. 373-2-7 Civ. Code.

¹⁶⁰ Art. 373-2-8 Civ. Code.

¹⁶¹ Art. 373-2-9 Civ. Code.

¹⁶² French law distinguishes between the *attribution* of parental authority and its *exercise*. Being deprived of the *exercise* of parental responsibility does not mean that the parent concerned is deprived of parental authority *per se*. However, one or both parents may be deprived in full or in part of parental authority in an extreme case, either by an express provision of a criminal

Applying these provisions, the *Cour de cassation* recalled, in a decision of 13 March 2007, that the welfare of the child is of paramount importance in determining the residence of the child, in accordance with Article 3(1) of the UN Convention on the Rights of the Child and Article 372-2 of the Civil Code. In this particular case, the court of appeal had permitted the relocation of the child, basing its reasoning upon the respondent father's situation and conduct in relation to the child, rather than applying a best interests test. The *Cour de cassation* remitted the case to the lower court clearly stating that the correct test to be applied in such case was that of the best interests of the child.

The Civil Code also provides factors that a judge must take into account when deciding on the exercise of parental authority. These factors include, in particular, the feelings expressed by the child.¹⁶⁹ In an important relocation case, the *Cour de cassation* reaffirmed this by

applying Articles 3(1) and 12(2) of the UN Convention on the Rights of the Child, overturning a court of appeal decision that did not take into account the request of the child concerned to be heard in the proceedings.¹⁷⁰

Another crucial element in the best interests test is the child's right to maintain personal relations with his or her parents. In this regard, the *Cour de cassation* recalled recently that the court seized with a relocation case must take into account, among other elements, the ability of each parent to assume his or her duties and to respect the rights of the other as prescribed by Article 373-2-11 of the Civil Code.¹⁷¹

Finally, it is worth noting that the decisions referred to here involve both international and national relocation cases. This is because Article 373-2 of the Civil Code does not distinguish between such relocations and therefore applies whether the proposed relocation is within France or to another jurisdiction.

¹⁶⁹ Art. 373-2-11 Civ. Code.

¹⁷⁰ See *Cour de cassation*, Chambre civile 1, du 18 mai 2005, 02-20.613, Publié au bulletin.

¹⁷¹ See also *Cour de cassation*, civile, Chambre civile 1, 27 mars 2008, 07-14.301, Inédit.

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